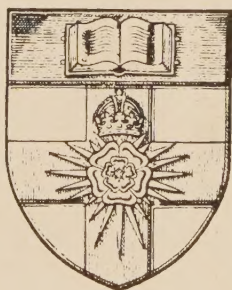


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<i>Page.</i>	<i>Line</i>	<i>For</i>	<i>Read</i>
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A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME.

A.		B.	
	PAGE		PAGE
Allen <i>v.</i> Public Trustee. In re		Bebington <i>v.</i> Wildman. In re	
Wedgwood (C. A.)	601	Bebington's Tenancy — —	559
Anglo-Austrian Bank (London		Bebington's Tenancy, In re.	
Agency), In re — —	284	Bebington <i>v.</i> Wildman — —	559
Anglo-French Music Co. <i>v.</i>		Berton, Metropolitan Water	
Nicoll — — —	386	Board <i>v.</i> — — —	299
Aramayo Francke Mines, In re		Block, Levashoff <i>v.</i> In re	
(C. A.)	675	Korvine's Trust — — —	343
Asphalte (Claridge's Patent) Co.,		Boscawen <i>v.</i> Wyndham. In re	
In re — — —	543	Sutton — — —	257
Attorney-General, Friend of the		Bostock, Norrish <i>v.</i> In re Bos-	
Clergy <i>v.</i> In re		tock's Settlement — —	432
Friend of the		Bostock's Settlement, In re.	
Clergy's Charters	409	Norrish <i>v.</i> Bostock — —	432
——— <i>v.</i> Fulham Corpora-		Bowler <i>v.</i> Lovegrove — —	642
tion — — —	440	Boyce, Wasbrough <i>v.</i> In re	
——— Thomas <i>v.</i> In re		Ellis's Settlement (C. A.)	230
Welsh Hospital (Netley) Fund	655	Breweries (Crewkerne United)	
		<i>v.</i> Slade — — —	160

	PAGE		PAGE
Brunner, Mond & Co., <i>Evans v.</i>	359	F.	
Bulgaria (Ferdinand, Ex-Tsar of), In re - - - (C. A.)	107	Ferdinand, Ex-Tsar of Bulgaria, In re - - - (C. A.)	107
		Film Renting (Ideal) Co. <i>v.</i> Nielsen - - -	575
C.		Friend of the Clergy <i>v.</i> Attorney- General. In re Friend of the Clergy's Charters- - -	409
Cable (Direct United States) Co. <i>v.</i> Western Union Telegraph Co. - - -	370	Friend of the Clergy's Charters, In re. Friend of the Clergy <i>v.</i> Attorney-General- - -	409
Claridge's Patent Asphalte Co., In re - - -	543	Fulham Corporation, Attorney- General <i>v.</i> - - -	440
Conyngham, In re. Conyngham <i>v.</i> Conyngham (C. A.)	491		
----- <i>v.</i> Conyngham. In re Conyngham - (C. A.)	491	G.	
Coope <i>v.</i> Ridout - (C. A.)	291	Gaskin's Patents, In re (C. A.)	69
Crewkerne United Breweries <i>v.</i> Slade. In re Slade - -	160	Green and Hussey's Contract, In re - - -	566
		Gunston <i>v.</i> Winox, Ld. - - -	165
D.		----- (C. A.)	664
Dashwood <i>v.</i> Hinckes. In re Hinckes - - - (C. A.)	475	Halton, Mayhew <i>v.</i> In re Morris	172
Davidson's Patents, In re (C. A.)	69		
Davies, Richards <i>v.</i> - -	90	H.	
Denny, Rosedale <i>v.</i> - (C. A.)	57	Hansford <i>v.</i> Jago - - -	322
Denton <i>v.</i> West. In re West	533	Harcourt, In re. Portman (Vis- count) <i>v.</i> Portman - - -	187
Dilke, In re. In re Dilke's Settle- ment Trusts. Verey <i>v.</i> Dilke - - - (C. A.)	34	Hardy, Neville <i>v.</i> - - -	404
----- Verey <i>v.</i> In re Dilke. In re Dilke's Settlement Trusts - - - (C. A.)	34	Harmer <i>v.</i> Jumbil (Nigeria) Tin Areas - - - (C. A.)	200
Direct United States Cable Co. <i>v.</i> Western Union Telegraph Co. - - -	370	Henderson <i>v.</i> Schiff. In re Schiff- - - -	149
Dodd <i>v.</i> Williams. In re Powell	178	Hinckes, In re. Dashwood <i>v.</i> Hinckes - (C. A.)	475
		----- Dashwood <i>v.</i> In re Hinckes - - - (C. A.)	475
E.		Holden <i>v.</i> Southwark Corpora- tion - - - -	550
Electric Power Supply (North Metropolitan) Co. <i>v.</i> Stoke Newington Corporation -	455	Hudston <i>v.</i> Viney - - -	98
Ellis's Settlement, In re. Was- brough <i>v.</i> Boyce - (C. A.)	230	Hussey and Green's Contract, In re - - -	566
Evans <i>v.</i> Brunner, Mond & Co.	359	----- <i>v.</i> Simper. In re Hussey	566
Eyles, Macdonald <i>v.</i> - -	631	I.	
		Ideal Film Renting Co. <i>v.</i> Nielsen - - -	575

J.			N.		
		PAGE			PAGE
Jago, Hansford <i>v.</i>	—	—	National Bank für Deutschland,		
Jenkin <i>v.</i> Pharmaceutical Society	—	—	In re —	—	284
of Great Britain	—	392	Nevile <i>v.</i> Hardy	—	404
Jones <i>v.</i> Rebbeck.	In re Rich-		Nicoll, Anglo-French Music Co. <i>v.</i>		386
ards	—	513	Nielsen, Ideal Film Renting Co. <i>v.</i>		575
Jumbil (Nigeria) Tin Areas,			Nierhaus, In re	—	269
Harmer <i>v.</i>	—	(C. A.) 200	Norrish <i>v.</i> Bostock. In re Bos-		
			tock's Settlement	—	432
			North Metropolitan Electric		
			Power Supply Co. <i>v.</i> Stoke		
			Newington Corporation	—	455
K.			P.		
Korvine's Trust, In re. Lava-			Pharmaceutical Society of		
shoff <i>v.</i> Block	—	343	Great Britain, Jenkin <i>v.</i>	—	392
			Portman (Viscount) <i>v.</i> Portman.		
			In re Harcourt	—	187
			Powell, In re. Dodd <i>v.</i> Williams		178
			Public Trustee, Allen <i>v.</i> In re		
			Wedgwood	—	(C. A.) 601
L.			R.		
Lansdell, Wise <i>v.</i>	—	420	Rebbeck, Jones <i>v.</i> In re Rich-		
Lavashoff <i>v.</i> Block. In re Kor-			ards	—	513
vine's Trust	—	343	Richards, In re. Jones <i>v.</i> Reb-		
Lovegrove, Bowler <i>v.</i>	—	642	beck	—	513
			— <i>v.</i> Davies	—	90
			Ridout, Coope <i>v.</i>	(C. A.)	291
			Riley, White <i>v.</i>	(C. A.)	1
			Rossdale <i>v.</i> Denny	(C. A.)	57
M.			S.		
Macartney, In re. Macfarlane			Schiff, In re. Henderson <i>v.</i>		
<i>v.</i> Macartney	—	522	Schiff	—	149
— Macfarlane <i>v.</i> In re			— Henderson <i>v.</i> In re		
Macartney	—	522	Schiff	—	149
Macdonald <i>v.</i> Eyles	—	631	Shaftesbury (Earl), Westmin-		
Macfarlane <i>v.</i> Macartney. In re			ster (Duke). In re Duke of		
Macartney	—	522	Westminster's Settled Es-		
Mayhew <i>v.</i> Halton. In re			tates	—	585
Morris	—	172	Shaw <i>v.</i> Willis. In re Willis		
Metropolitan Water Board <i>v.</i>			(C. A.)		44
Berton	—	299	Simper, Hussey <i>v.</i> In re		
Meyrick <i>v.</i> Meyrick. In re Mey-			Hussey	—	566
rick's Settlement	—	311			
Meyrick's Settlement, In re.					
Meyrick <i>v.</i> Meyrick	—	311			
Michelham, In re. Michelham					
<i>v.</i> Michelham	—	705			
— <i>v.</i> Michelham. In re					
Michelham	—	705			
Morris, In re. Mayhew <i>v.</i>					
Halton	—	172			
Musie (Anglo-French) Co. <i>v.</i>					
Nicoll	—	386			

	PAGE		PAGE
Slade, In re. Crewkerne United Breweries <i>v.</i> Slade -	160	Wasbrough <i>v.</i> Boyce. In re Ellis's Settlement (C. A.)	230
— Crewkerne United Brew- eries <i>v.</i> In re Slade -	160	Water (Metropolitan) Board <i>v.</i> Berton -	299
Southwark Corporation, Holden <i>v.</i>	550	Wedgwood, In re. Allen <i>v.</i> Public Trustee - (C. A.)	601
Steel Wing Co., In re -	349	Welsh Hospital (Netley) Fund, In re. Thomas <i>v.</i> Attorney- General -	655
Stoke Newington Corporation, North Metropolitan Electric Power Supply Co. <i>v.</i> -	455	West, In re. Denton <i>v.</i> West	533
Sutton, In re. Boscawen <i>v.</i> Wyndham -	257	— Denton <i>v.</i> In re West	533
		Western Union Telegraph Co., Direct United States Cable Co. <i>v.</i> -	370
T.		Westminster (Duke) <i>v.</i> Shaftes- bury (Earl). In re Duke of Westminster's Settled Estates -	585
Tate <i>v.</i> Thomas	503	Westminster's (Duke of) Settled Estates, In re. Duke of West- minster <i>v.</i> Earl of Shaftesbury	585
Telegraph (Western Union) Co., Direct United States Cable Co. <i>v.</i> -	370	White <i>v.</i> Riley - (C. A.)	1
Thomas, In re. Thomas <i>v.</i> Thomas -	306	Wildman, Bebington <i>v.</i> In re Bebington's Tenancy -	559
— <i>v.</i> Attorney - General. In re Welsh Hospital (Netley) Fund -	655	Williams, Dodd <i>v.</i> In re Powell	178
— Tate <i>v.</i> -	503	Willis, In re. Shaw <i>v.</i> Willis (C. A.)	44
— <i>v.</i> Thomas. In re Thomas -	306	— Shaw <i>v.</i> In re Willis (C. A.)	44
		Winox, Ltd., Gunston <i>v.</i> -	165
V.		— (C. A.)	664
Verey <i>v.</i> Dilke. In re Dilke. In re Dilke's Settlement Trusts - (C. A.)	34	Wise <i>v.</i> Lansdell -	420
Viney, Hudston <i>v.</i> -	98	Wyndham, Boscawen <i>v.</i> In re Sutton -	257

TABLE OF CASES CITED.

A.

		PAGE
Abbiss <i>v.</i> Burney	17 Ch. D. 211	498
Adam <i>v.</i> Newbigging	13 App. Cas. 308	481
Aldin <i>v.</i> Latimer Clark, Muirhead & Co.	[1894] 2 Ch. 437	200
Allen <i>v.</i> Flood	[1898] A. C. 1	1
— <i>v.</i> Taylor	16 Ch. D. 355	322
Allsop, In re	[1914] 1 Ch. 1	547
Angerstein, In re	[1895] 2 Ch. 883	193
Anon.	Freem. Ch. 262	46
Antoine <i>v.</i> Morshead	6 Taunt. 237	117
Aplin <i>v.</i> Stone	[1904] 1 Ch. 543	495
Aramayo Francke Mines, In re	[1917] 1 Ch. 451	683
Archer's Case	1 Rep. 66b.	566
Arden's Settlement, In re	[1890] W. N. 204	254
Armit's Trusts, In re	L. R. 5 Eq. 352	261
Artizans, Labourers and General Dwell- ings Co. <i>v.</i> Whitaker	[1919] 2 K. B. 301	407
Ashbury Railway Carriage Co. <i>v.</i> Riche	L. R. 7 H. L. 653	361, 450
Aslatt <i>v.</i> Southampton Corporation	16 Ch. D. 143	554
Attorney-General <i>v.</i> De Keyser's Royal Hotel	[1920] A. C. 508	139
— <i>v.</i> Great Eastern Ry. Co.	5 App. Cas. 473	448
— <i>v.</i> Hackney Corpora- tion	[1918] 1 Ch. 372	460
— <i>v.</i> Long Eaton Urban Council	[1914] 2 Ch. 251	460
— <i>v.</i> Manchester Cor- poration	[1906] 1 Ch. 643	397
— <i>v.</i> Mersey Ry. Co.	[1907] A. C. 415	449
— <i>v.</i> Syderfen	1 Vern. 224	46
— <i>v.</i> Weeden	Parker, 267	117
Attwood <i>v.</i> Lamont	[1920] 3 K. B. 571	646

B.

Badeley <i>v.</i> Consolidated Bank	38 Ch. D. 238	162
Baggs <i>v.</i> Miller	The Times, July 22, 1920	508
Bagot Pneumatic Tyre Co. <i>v.</i> Clipper Pneumatic Tyre Co.	[1902] 1 Ch. 146	635
Ball's Trusts, In re	11 Ch. D. 270	235
Barfield <i>v.</i> Nicholson	2 L. J. (Ch.) O. S. 90	507
Barker <i>v.</i> Stickney	[1919] 1 K. B. 121	632
Barrow <i>v.</i> Isaacs & Son	[1891] 1 K. B. 417	581
Bates <i>v.</i> Donaldson	[1896] 2 Q. B. 241	580
Bayley <i>v.</i> Great Western Ry. Co.	26 Ch. D. 434	326
Bazelgette <i>v.</i> Hampton	36 Times L. R. 240	406
Beaumont, In re	[1902] 1 Ch. 889	347
Beddington <i>v.</i> Atlee	35 Ch. D. 317	326
Beresford-Hope, In re	[1917] 1 Ch. 287	191

		PAGE
Berwick & Co. v. Price	[1905] 1 Ch. 632	102
Birmingham, Dudley and District Banking Corporation v. Ross	38 Ch. D. 295	215, 327
Biscoe v. Jackson	35 Ch. D. 460	54
Blackburn v. Stables	2 V. & B. 367	569
Blank v. Footman	39 Ch. D. 678	167, 666
Bolton v. Bolton	11 Ch. D. 968	322
Bonnewell v. Jenkins	8 Ch. D. 70	60
Borland's Trustee v. Steel Bros. & Co.	[1901] 1 Ch. 279	427
Bowyer's Settled Estates, In re	{ [1892] W. N. 48; 8 Times L. R. 441	586
Brailsford, In re	[1916] 2 Ch. 536	309
Brandt's, Sons & Co. v. Dunlop Rubber Co.	{ [1905] A. C. 454	352
Breay v. Royal British Nurses Asso- ciation	{ [1897] 2 Ch. 272	392
Brice v. Bannister	3 Q. B. D. 569	351
British Actors Film Co. v. Glover	[1918] 1 K. B. 299	635
British Red Cross Balkan Fund, In re	[1914] 2 Ch. 419	655
British South Africa Co. v. De Beers Consolidated Mines	{ [1910] 1 Ch. 354	396
Bromet v. Neville	53 Sol. J. 321	64
Brotherton's Estate, In re	[1908] W. N. 56	597
Brown v. Alabaster	37 Ch. D. 490	322
— v. United States	8 Cranch, 110	125
Brown's Patent, In re	[1920] W. N. 158	73
Browne v. Flower	[1911] 1 Ch. 219	200
Brydone's Settlement, In re	[1903] 2 Ch. 84	231
Byrne v. Statist Co.	[1914] 1 K. B. 622	507

C.

Cable v. Bryant	[1908] 1 Ch. 259	206
Cain v. Moon	[1896] 2 Q. B. 283	346
Campden Charities, In re	18 Ch. D. 310	656
Candy v. Campbell	2 Cl. & F. 421	307
Cardross's Settlement, In re	7 Ch. D. 728	258
Carrick v. Errington	{ 2 P. Wms. 361; 5 Bro. P. C. 391	491
Cartwright v. Cartwright	3 D. M. & G. 982	313
Cecil v. Langdon	28 Ch. D. 1	327
Chambers v. Goldwin	9 Ves. 254	174
Chesham's (Lord) Settlement, In re	[1909] 2 Ch. 329	187
Chinnoek v. Ely (Marchioness)	4 D. J. & S. 638	60
Christie v. Gosling	L. R. 1 H. L. 279	188
Clark v. Robinson	51 W. R. 443	64
— v. Taylor	1 Drew. 642	658
Clarke v. Colls	9 H. L. C. 601	247
Clerk v. Day	Cro. Eliz. 313	569
Cockayne v. Harrison	L. R. 13 Eq. 432	178
Cohen v. Tannar	[1900] 2 Q. B. 609	215
Combined Weighing and Advertising Machine Co., In re	{ 43 Ch. D. 99.	351
Conlan v. Carlow County Council	[1912] 2 I. R. 535	349
Conway v. Wade	[1909] A. C. 506	7
Cotman v. Brougham	[1918] A. C. 514	362
Cotton Control Board's Levies Fund, In re	{ Unreported	657

		PAGE
Cottrell v. Cottrell	28 Ch. D. 628	586
Cox v. Glue	5 C. B. 533	93
— v. Mousley	5 C. B. 535	93
Craven's Mortgage, In re	[1907] 2 Ch. 448	172
Cresswell, In re	24 Ch. D. 102	193
Crosby v. Wadsworth	6 East, 602	92
Crossley v. Maycock	L. R. 18 Eq. 180	61
Cullerne v. London, &c., Building Society	25 Q. B. D. 485	546

D.

Daimler Co. v. Continental Tyre and Rubber Co.	[1916] 2 A. C. 307	112
D'Angibau, In re	15 Ch. D. 228	261
Davies v. Thomas	[1920] 2 Ch. 189	8
Davis v. Town Properties Investment Corporation	[1903] 1 Ch. 797	200
Davison's Settlement, In re	[1913] 2 Ch. 498	568
Dawson v. Small	L. R. 9 Ch. 651	307
De Brimont v. Penniman	{ 10 Blatchford's Circuit Ct. Rep. 436	522
De Keyser's Royal Hotel, In re	[1919] 2 Ch. 197	113
De Mattos v. Gibson	4 De G. & J. 276	632
Dewes v. Fitch	[1920] 2 Ch. 159	646
D'Eyncourt v. Gregory	34 Beav. 36	491
Dibbins v. Dibbins	[1896] 2 Ch. 348	562
Dillon, In re	44 Ch. D. 76	514
Doe v. Archer	14 East, 245	561
— v. Church	3 Camp. 71	561
— v. Goldwin	2 Q. B. 143	562
— v. Johnston	1 M'Clel. & Y. 141	561
— v. Milward	3 M. & W. 328	561
— v. Smith	5 Ad. & E. 250	562
— v. Walters	10 B. & C. 626	562
Donnelly v. Adams	[1905] 1 I. R. 154	323
Douglas, In re	35 Ch. D. 472	49
D'Oyly, In re	[1917] 1 Ch. 556	607
Dubber v. Trollope	Amb. 453	569
Duffield v. Elwes	1 Bli. (N. S.) 497	517
Dungannon (Lord) v. Smith	12 Cl. & F. 548	194
Durant v. Titley	7 Price, 577	320
Durham Brothers v. Robertson	[1898] 1 Q. B. 765	352

E.

Eades, In re	[1920] 2 Ch. 353	53
Eales v. Drake	{ 1 Ch. D. 217; 45 L. J. (Ch.) 51; 24 W. R. 184	533, 539
Edinburgh Life Assurance Co. v. Lord Advocate	[1910] A. C. 143	706
Edwards, In re	[1894] 3 Ch. 644	307
Electrical Pavilions (Marble Arch) v. Lorden	[1918] 2 Ch. 399	459
Embiricos v. Anglo-Austrian Bank	[1905] 1 K. B. 677	346
Emmins v. Bradford	13 Ch. D. 493	237
Epsom Grand Stand Association v. Clarke	[1919] W. N. 170	406

		PAGE
Espuela Land and Cattle Co., In re	[1909] 2 Ch. 187	386
Evans v. Evans	[1892] 2 Ch. 173	568
—— v. Levy	[1910] 1 Ch. 453	580
—— v. Wood	L. R. 5 Eq. 9	420
Eve, In re	[1917] 1 Ch. 562	607

F.

Falcke v. Gray	4 Drew. 651	632
Filby v. Hounsell	[1896] 2 Ch. 737	64
Foley v. Burnell	1 Bro. C. C. 274	187
Forbes, In re	[1899] W. N. 6	236
Forster v. Baker	[1910] 2 K. B. 636	349
Fothergill's Estate, In re	[1903] 1 Ch. 149	193
Fowler, In re	[1917] 2 Ch. 307	193
Fraser and Chalmers, In re	[1919] 2 Ch. 114	386
Fried Krupp v. Orconera Iron Ore Co.	88 L. J. (Ch.) 304	120
Fried Krupp Aktien-gesellschaft, In re	{ [1916] 2 Ch. 194; [1917] 2 Ch. 188	270, 273
Fuller v. Chamier	L. R. 2 Eq. 682	569
Furtado v. Rodgers	3 Bos. & P. 191	111

G.

Gardner v. Parker	3 Madd. 184	517
Garrard v. Lauderdale (Lord)	3 Sim. 1; 2 Russ. & My. 451	482
Gaskell v. Lancashire and Cheshire } Miners' Federation	28 Times L. R. 518	7
Geraghty v. M'Cann	I. R. 6 C. L. 411	340
German Date Coffee Co., In re	20 Ch. D. 169	362
Giblan v. National Amalgamated } Labourers' Union	[1903] 2 K. B. 600	7
Gillies' Settlement, In re	[1917] 2 Ch. 205	435
Goldstein v. Sanders	[1915] 1 Ch. 549	580
Goodtitle v. Woodward	3 B. & Al. 689	562
Gore v. Gore	2 P. Wms. 28	494
Grace v. Newman	L. R. 19 Eq. 623	508
Greaves v. Simpson	{ 33 L. J. (Ch.) 641; 10 Jur. N. S. 609	568
Green v. Giles	5 Ir. Ch. Rep. 25	307
Griffith's Will, In re	49 L. T. 161	592
Grosvenor Hotel Co. v. Hamilton	[1894] 2 Q. B. 836	206
Groves v. Wright	2 K. & J. 347	178

H.

H. v. W.	3 K. & J. 382	313
Hancock, In re	[1896] 2 Ch. 173	249
Harcourt, In re	[1920] 1 Ch. 493	190
Hardman v. Maffett	13 L. R. Ir. 499	245
Harrington (Countess) v. Harrington } (Earl)	L. R. 5 H. L. 87	188
Harrison, Ex parte	28 Ch. D. 363	420
Harrop v. Harrop	[1920] 3 K. B. 386	522
Hawkesworth v. Chaffey	55 L. J. (Ch.) 335	64
Haynes v. Doman	[1899] 2 Ch. 13	646

		PAGE
Heathcote, In re	[1891] W. N. 10	533
Heinrichs v. Bastendorff	10 R. P. C. 160	167
Henderson v. Bank of Australasia	40 Ch. D. 170	362
Hildesheimer v. Dunn & Co.	64 L. T. 452	508
Hill v. Grange	Plowd. 164	331
Hoblyn v. The King	2 Bro. P. C. 329	397
Hodges v. Webb	[1920] 2 Ch. 70	1
Holt v. A. E. G. Electric Co.	[1918] 1 Ch. 320	142
Hope Johnstone, In re	[1904] 1 Ch. 470	313
Hopkins v. Hopkins	{ Cas. temp. Talb. 44; 1 Atk. 581	491
Horseman v. Abbey	1 Jac. & W. 381	233
Hough v. Windus	12 Q. B. D. 224	168
Howard v. Maitland	11 Q. B. D. 695	215
Hudson, In re	[1911] 1 Ch. 206	347
Hughes v. Pump House Hotel Co.	[1902] 2 K. B. 190	352
Humpherson v. Syer	4 R. P. C. 407	167
Hunloke's Settled Estates, In re	[1902] 1 Ch. 941	590
Hunt v. Stevens	[1878] W. N. 79	666
Huntington v. Attrill	[1893] A. C. 150	525

I.

Inland Revenue Commissioners v. Blott	[1920] 1 K. B. 114	175
Inholder's Co. v. Wainewright	[1917] W. N. 172	459
Ironmongers' Co. v. Attorney-General	10 Cl. & F. 908	656

J.

Jaeger v. Mansions Consolidated	87 L. T. 690	215
Jee v. Thurlow	2 B. & C. 547	320
Jenkins v. Price	[1907] 2 Ch. 229	580
Johanna Emilie, The	Spinks' Prize Cas. 14	115
Johnstone v. Hudlestone	4 B. & C. 922	561
Joint Stock Discount Co. v. Brown	L. R. 8 Eq. 381	546
Jones v. Humphries	[1902] 1 K. B. 10	352
— v. Pritchard	[1908] 1 Ch. 630	333
Julius v. Oxford (Bishop)	5 App. Cas. 214	73
Jull v. Jacobs	3 Ch. D. 703	495

K.

Kelly, In re	[1910] 1 Ch. 78	536
Kenrick & Co. v. Lawrence & Co.	25 Q. B. D. 99	507
Kershaw v. Shoreditch Corporation	22 Times L. R. 302	554
Keys v. Keys	[1919] 2 I. R. 160	526
Kiddill v. Farnell	26 L. J. (Ch.) 818	518
King v. Melling	1 Vent. 214	569
Kingsbury Collieries and Moore's Con- tract, In re	{ [1907] 2 Ch. 259	363

L.

Lacon's Settlement, In re	[1911] 2 Ch. 17	590
Lainson v. Lainson	18 Beav. 1; 5 D. M. & G. 754	495
Lambert v. Overton	11 L. T. 503	518

	PAGE
Land v. North (Lord)	4 Doug. 266 117
Larkin v. Long	[1915] A. C. 814 7
Lee, In re	[1918] 2 Ch. 320 517
Leeds Permanent Benefit Building Society v. Mallandaine	[1897] 2 Q. B. 402 707
Leng, In re	[1895] 1 Ch. 652 162
Leng & Co. v. Andrews	[1909] 1 Ch. 763 647
Leslie v. Rothes (Earl)	[1894] 2 Ch. 499 481
Lewis, In re	[1918] 2 Ch. 308 191
Lewis & Allenby v. Pegge	[1914] 1 Ch. 782 580
Ling and Duhr, In re	[1918] 2 Ch. 298 146, 271, 679
Lloyd v. Nowell	[1895] 2 Ch. 744 64
London and Provincial Telegraph Co., In re	L. R. 9 Eq. 653 420
London County Council v. Attorney-General	[1901] A. C. 26 175
General v. Attorney-General	[1902] A. C. 165 448
Lonsdale (Earl) v. Lowther	[1900] 2 Ch. 687 590
Lumley v. Gye	2 E. & B. 216 21
— v. Wagner	1 D. M. & G. 604 634
Lyttelton Times Co. v. Warners	[1907] A. C. 476 207, 333

M.

Macdougall v. Paterson	{ 11 C. B. 755 ; 21 L. J. (C. P.) 27 73
MacMahon v. MacMahon	[1913] 1 I. R. 154, 428 311, 321
Mainwaring v. Giles	5 B. & Al. 356 93
Mare, In re	[1902] 2 Ch. 112 236
Marlborough (Duchess) v. Marlborough (Duke)	[1901] 1 Ch. 165 313
Martelli v. Holloway	L. R. 5 H. L. 532 193
Marzetti's Case	{ [1880] W. N. 50 ; 28 W. R. 541 546
Mason v. Provident Clothing and Supply Co.	[1913] A. C. 724 647
Masters v. Green	20 Q. B. D. 807 92
Maudslay, Sons & Field, In re	[1900] 1 Ch. 602 683
Maynard v. Gibson	[1876] W. N. 204 184
Mersey Docks and Harbour Board v. Lucas	8 App. Cas. 891 302
Metcalf, In re	[1903] 2 Ch. 424 542
Metropolitan Electric Supply Co. v. London County Council	[1919] 1 Ch. 357 459
Metropolitan Water Board v. Dick, Kerr & Co.	[1918] A. C. 119 459
Miles v. Harford	12 Ch. D. 691 192
Mills v. Cannon Brewery Co.	[1920] 2 Ch. 38 580
— v. Farmer	1 Mer. 55 44
Mitchell v. Egyptian Hotels	[1915] A. C. 1022 687
Moggridge v. Thackwell	7 Ves. 36 44
Mollett v. Brayne	2 Camp. 103 561
Monckton's Settlement, In re	[1913] 2 Ch. 636 435
Montgomery Moore Ship Syndicate, In re	72 L. J. (Ch.) 624 349
Moore v. Darton	4 De G. & Sm. 517 517

		PAGE
Morris v. Howes	4 Hare, 599	233
—— v. Morris	17 Beav. 198	308
—— v. Saxelby	[1916] 1 A. C. 688	646
Münster, In re	[1920] 1 Ch. 268	120, 271
Myers v. Catterson	43 Ch. D. 470	206
—— v. Washbrook	[1901] 1 K. B. 360	180

N.

National Telephone Co., In re	[1914] 1 Ch. 755	386
National Trustees Co. of Australasia v. General Finance Co. of Australasia	[1905] A. C. 373	546
New Zealand Shipping Co. v. Société des Ateliers et Chantiers de France	[1919] A. C. 1	311
Newby v. Sharpe	8 Ch. D. 39	207
Newcastle's (Duke of) Estates, In re	24 Ch. D. 129	261
Nicholls v. Nicholls	81 L. T. 811	326
Nichols and Von Joel's Contract, In re	[1910] 1 Ch. 43	567
Nicol's Case	29 Ch. D. 421	687
Nierhaus, In re	[1921] 1 Ch. 269	285
North v. Percival	[1898] 2 Ch. 128	57
Nottage v. Jackson	11 Q. B. D. 627	507
Nouvion v. Freeman	{ 37 Ch. D. 249; 15 App. Cas. 1	522, 531
Nunn v. Nunn	6 L. R. Ir. 115; 8 L. R. Ir. 298	526
Nutt's Settlement, In re	[1915] 2 Ch. 431	435
Nutton v. Wilson	22 Q. B. D. 744	550

O.

Oliver v. Hinton	[1899] 2 Ch. 264	98
Oliver's Settlement, In re	[1905] 1 Ch. 191	435
Ooster Eems, The	1 C. Rob. 284 <i>n</i>	117
Osborne v. Amalgamated Society of Railway Servants	{ [1909] 1 Ch. 163; [1910] A. C. 87	396

P.

Page v. Norfolk	70 L. T. 781	64
Paine v. Warwick (Countess)	[1914] 2 K. B. 486	178
Palmer, In re	[1916] 2 Ch. 391	602
—— v. Fletcher	1 Lev. 122; 1 Sid. 167, 227	336
Parker, In re	[1910] 1 Ch. 581	191
——	{ 117 L. T. 422; [1917] W. N. 233	602
Parker-Jervis, In re	[1898] 2 Ch. 643	608
Pearson v. Spencer	3 B. & S. 761	333
Pease v. Pattinson	32 Ch. D. 154	658
Peck and London School Board, In re	[1893] 2 Ch. 315	526
Peebles v. Crosthwaite	13 Times L. R. 37, 198	93
Pelham v. Gregory	3 Bro. P. C. 204	193
Pender v. Lushington	6 Ch. D. 70	427
Performing Rights Society v. Thompson	34 Times L. R. 351	635
Peruvian Railways Company v. Thames and Mersey Insurance Company	{ L. R. 2 Ch. 617	363

	PAGE
Peto <i>v.</i> Hammond	30 Beav. 495 102
Pharaon et fils, In re	[1916] 1 Ch. 4 678
Phelps <i>v.</i> London Corporation	[1916] 2 Ch. 255 215
Phillips <i>v.</i> Beal	32 Beav. 25 185
——— <i>v.</i> Eyre	L. R. 6 Q. B. 1 112
——— <i>v.</i> Low	[1892] 1 Ch. 47 327
Pickering <i>v.</i> Stephenson	L. R. 14 Eq. 322 397
Pilcher <i>v.</i> Rawlins	L. R. 7 Ch. 259 102
Popplewell <i>v.</i> Hodgkinson	L. R. 4 Ex. 248 207
Port of London Authority <i>v.</i> Inland Revenue Commissioners.	[1919] 2 K. B. 608; [1920] 2 K. B. 612 302
Porter <i>v.</i> Freudenberg	[1915] 1 K. B. 857 116
Potts <i>v.</i> Potts	1 H. L. C. 671 192
Pratt <i>v.</i> British Medical Association	[1919] 1 K. B. 244 10
Prince <i>v.</i> Evans	29 L. T. 835 561
Prince Albert <i>v.</i> Strange	1 Mac & G. 25 168
Princess Mary's Fund, In re	Unreported 656
Printing and Numerical Registering Company <i>v.</i> Sampson	L. R. 19 Eq. 462 632
Purser <i>v.</i> Purser	[1913] 1 I. R. 428 311
Pwllbach Colliery Company <i>v.</i> Woodman	[1915] A. C. 634 327

Q.

Quicke <i>v.</i> Chapman	[1903] 1 Ch. 659 215
Quinn <i>v.</i> Leatham	[1901] A. C. 495 7

R.

Ratcliffe <i>v.</i> Barnard	L. R. 6 Ch. 652 102
Reg. <i>v.</i> Duffield	5 Cox C. C. 404 10
——— <i>v.</i> Hewitt	5 Cox C. C. 162 10
——— <i>v.</i> Reed	5 Q. B. D. 483 396
Rendall <i>v.</i> Crystal Palace Company	4 K. & J. 326 392
Rex <i>v.</i> Beer	[1903] 2 K. B. 693 553
——— <i>v.</i> Croft (Inhabitants)	3 B. & Al. 171 93
——— <i>v.</i> Mitchell	[1913] 1 K. B. 561 73
——— <i>v.</i> Roscommon Justices	[1906] 2 I. R. 173 554
——— <i>v.</i> Rowlands	[1906] 2 K. B. 292 554
——— <i>v.</i> Williamson	Freem. K. B. 39 117
Richardson <i>v.</i> Methley School Board	[1893] 3 Ch. 510 554
Riche <i>v.</i> Ashbury Railway Carriage Company	L. R. 9 Ex. 224 396
Right <i>v.</i> Cuthell	5 East, 491 561
Robinson <i>v.</i> Kilvert	41 Ch. D. 88 207
Rodes, In re	[1909] 1 Ch. 815 590
Rodney (Lord) <i>v.</i> Chambers	2 East, 283 315
Roose, In re	17 Ch. D. 696 179
Ropeways, Ltd. <i>v.</i> Hoyle	120 L. T. 538 647
Rossdale <i>v.</i> Denny	[1921] 1 Ch. 57 294
Rossiter <i>v.</i> Miller	5 Ch. D. 648; 3 App. Cas. 1124 60, 62, 294
Roumanian (The)	[1916] 1 A. C. 124 112
Rousillon <i>v.</i> Rousillon	14 Ch. D. 351 522
Rucker <i>v.</i> Scholefield	1 H. & M. 36 533

		PAGE
Rudd <i>v.</i> Bowles	[1912] 2 Ch. 60	323
Rufford <i>v.</i> Bishop	5 Russ. 346	174
Russell <i>v.</i> Town and County Bank	13 App. Cas. 418	302

S.

Salisbury <i>v.</i> Denton	3 K. & J. 529	46
Sanders <i>v.</i> Ashford	28 Beav. 609	308
Sanderson <i>v.</i> Berwick-on-Tweed Cor- poration	13 Q. B. D. 547	215
Sangster <i>v.</i> Kay	5 Ex. 386	396
Santa Fe Land Company <i>v.</i> Forestal Land, Timber and Railways Com- pany	26 Times L. R. 534	64
Sargent, Ex parte	L. R. 17 Eq. 273	425
Savory, Ltd. <i>v.</i> The World of Golf	83 L. J. (Ch.) 824	507
Scarsdale (Lord) <i>v.</i> Curzon	1 J. & H. 40	192
Schofield <i>v.</i> Maple Mills, Ltd.	34 Times L. R. 423	459
Schwann <i>v.</i> Cotton	[1916] 2 Ch. 459	327
Scott, In re	[1911] 2 Ch. 374	491
Secretary of State for India <i>v.</i> Scoble	[1903] A. C. 299	174
Sharpe, In re	[1892] 1 Ch. 154	546
Sheil, Ex parte	4 Ch. D. 789	162
Shelley's Case	1 Rep. 93b	566
Sheppard <i>v.</i> Hong Kong and Shanghai Banking Corporation	20 W. R. 459	581
Silcocks <i>v.</i> Silcocks	[1916] 2 Ch. 161	569
Simpson <i>v.</i> Westminster Palace Hotel Company	8 H. L. C. 712	362
Skipper <i>v.</i> Holloway	[1910] 2 K. B. 630	349
Smith's Settlement, In re	[1903] 1 Ch. 373	238
Snape, In re	[1915] 2 Ch. 179	605
Society of Practical Knowledge <i>v.</i> Abbott	2 Beav. 559	399
Stamford and Warrington (Earl), In re	[1912] 1 Ch. 343	193
Stephens <i>v.</i> Mysore Reefs Mining Company, In re	[1902] 1 Ch. 745	362
Stevens <i>v.</i> Benning	1 K. & J. 168; 6 D. M. & G. 223	636
— <i>v.</i> Chown	[1901] 1 Ch. 894	683
Stevenson <i>v.</i> Cartonnagen-Industrie	[1917] 1 K. B. 842	113
Steward <i>v.</i> Cotton	5 Russ. 17n	179
Stoddart, In re	[1916] 2 Ch. 444	602
— <i>v.</i> Saville	[1894] 1 Ch. 480	236
Sugden <i>v.</i> Leeds Corporation	[1914] A. C. 483	175, 706
Swansborough <i>v.</i> Coventry	9 Bing. 305	322
Sweet <i>v.</i> Cater	11 Sim. 572	636

T.

Tate <i>v.</i> Fullbrook	[1908] 1 K. B. 821	504
Tatham <i>v.</i> Vernon	29 Beav. 604	435
Taunton <i>v.</i> Royal Insurance Company	2 H. & M. 135	363
Taylor, Ex parte	12 Ch. D. 366	162
— In re	56 L. J. (Ch.) 597	517
— <i>v.</i> Harewood (Earl)	3 Hare, 372	482

		PAGE
Tebb <i>v.</i> Cave	[1900] 1 Ch. 642	213
Thomas <i>v.</i> Owen	20 Q. B. D. 225	322
Thursby's Settlement, In re	[1910] 2 Ch. 181	436
Tinkler, In re	[1917] 1 Ch. 242	607
Tollemache <i>v.</i> Coventry	2 Cl. & F. 611	194
Tomkinson <i>v.</i> South Eastern Railway Company	35 Ch. D. 675	362
Tompson <i>v.</i> Leith	4 Jur. (N. S.) 1091	174
Townsend's Estate, In re	34 Ch. D. 357	495
Trego <i>v.</i> Hunt	[1896] A. C. 7	208
Tregonwell <i>v.</i> Sydenham	3 Dow. 194	494
Treloar <i>v.</i> Bigge	L. R. 9 Ex. 151	581
Tringham's Trusts, In re	[1904] 2 Ch. 487	435
Tuff, In re	19 Q. B. D. 88	162
Turnbull, In re	[1905] 1 Ch. 726	608
Turton <i>v.</i> Lambardc	1 D. F. & J. 495	495

U.

University of London Press <i>v.</i> University Tutorial Press	[1916] 2 Ch. 601	507
Upton <i>v.</i> Brown	12 Ch. D. 872	235

V.

Vaisey <i>v.</i> Reynolds	5 Russ. 12	179
Valentine <i>v.</i> Hyde	[1919] 2 Ch. 129	1
Vandergucht <i>v.</i> De Blaquiére	5 My. & Cr. 229	311
Van Grutten <i>v.</i> Foxwell	[1897] A. C. 658	568
Victoria Nyanza (The)	[1919] P. 83	113
Von Hatzfeldt-Wildenburg <i>v.</i> Alexander	[1912] 1 Ch. 284	63, 291

W.

Waite <i>v.</i> Jennings	[1906] 2 K. B. 11	580
Walker <i>v.</i> Linom	[1907] 2 Ch. 104	102
Walton, Ex parte	17 Ch. D. 746	420
Ward <i>v.</i> Society of Attornies	1 Coll. 370	392
— <i>v.</i> Turner	2 Ves. Sen. 431	346, 517
Ward, Lock & Co. <i>v.</i> Long	[1906] 2 Ch. 550	507, 632
Wasserberg, In re	[1915] 1 Ch. 195	517
Wauters <i>v.</i> Association Internationale d'Agences	[1918] W. N. 267; 34 Times L. R. 577	459
Wedgwood, In re	[1915] 1 Ch. 113	603
Wellaway <i>v.</i> Courtier	[1918] 1 K. B. 200	92
Weir Hospital, In re	[1910] 2 Ch. 124	656
Wenlock (Baroness) <i>v.</i> River Dee Company	36 Ch. D. 674	398
West <i>v.</i> Gwynne	[1911] 2 Ch. 1	580
West of England Bank, In re	12 Ch. D. 288	427
West Rand Central Gold Mining Company <i>v.</i> The King	[1905] 2 K. B. 391	116
Westmeath <i>v.</i> Salisbury	5 Bligh N. S. 339	320
Westmeath (Earl) <i>v.</i> Westmeath (Countess)	Jac. 126	315

	PAGE
Westminster's (Duke of) Settled Estates, In re	[1920] 2 Ch. 445 592
Weston, In re	[1902] 1 Ch. 680 517
Westropp, In re	37 Ir. L. T. 183 533
Wheeldon v. Burrows	12 Ch. D. 31 327
Wheeler v. Humphreys	[1898] A. C. 506 536
Whiston's Settlement, In re	[1894] 1 Ch. 661 435
Whitwood Chemical Company v. Hardman	[1891] 2 Ch. 416 635
Wilkes' Estate, In re	16 Ch. D. 597 592
Will v. United Lankat Plantations Company	[1912] 2 Ch. 571 390
Willis, In re	[1917] 1 Ch. 365 491
Willmott v. London Road Car Company	[1910] 2 Ch. 525 580
Wilson v. Atkinson	4 D. J. & S. 455 234
Wingfield v. Snow	8 R. P. C. 15 167, 666
Winn v. Bull	7 Ch. D. 29 59, 291
Wix, In re	[1916] 1 Ch. 279 590
Wolff v. Oxholm	6 M. & S. 92 107
Wolverhampton New Waterworks Company v. Hawkesford	6 C. B. (N. S.) 336 683
Wombwell v. Hanrott	14 Beav. 143 535

Y.

Young v. Ashley Gardens Properties	[1903] 2 Ch. 112 580
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CASES
 DETERMINED BY THE
 CHANCERY DIVISION
 AND IN
 LUNACY
 AND ON APPEAL THEREFROM IN THE
 COURT OF APPEAL.

WHITE *v.* RILEY.

[1919. W. 2288.]

C. A.

1920

July 21, 22,
23, 26.

*Trade Union—Trade Dispute—Workmen and Workmen—Conspiracy—
Compelling Workman to join Shop Union—Threat to strike on Refusal—
Coercion on Employers—Dismissal without Notice—Breach of Contract—
Trade Disputes Act, 1906 (6 Edw. 7, c. 47), s. 3; s. 5, sub-s. 3.*

The mere statement to an employer by a number of workmen that they will not work with another workman, and that if that workman is retained in the employer's service they will strike, even where they have knowledge that he cannot dispense with their services, does not, of itself, constitute an unlawful threat, and is therefore not, of itself, actionable.

Dicta of Lord Watson, Lord Herschell and Lord Macnaghten in *Allen v. Flood* [1898] A.C. 1, 96, 98, 129, 147, 148 applied.

A dispute between workmen and workmen concerning which trade union workmen shall belong to is connected with the employment or non-employment of a particular workman and is a trade dispute within the meaning of s. 5, sub-s. 3, of the Trade Disputes Act, 1906, and is, in the absence of threats, protected by s. 3 of that Act.

Valentine v. Hyde [1919] 2 Ch. 129 disapproved.

Hodges v. Webb [1920] 2 Ch. 70 approved.

Decision of Astbury J. [1920] W. N. 182 reversed.

C. A. APPEAL from the decision of Astbury J. (1)

1920
WHITE
v.
RILEY.

The action was brought by the plaintiff, a leather worker, and a member of the Workers' Union, employed by Messrs. Meek and Dean, who carried on business as the Leamore Currying Co. at Walsall, against the defendants, who were employed by the same firm and were members of the Curriers' Union, for an injunction and damages, alleging that by conspiracy, threats, intimidation, and coercion they had caused his dismissal from his employment and procured a breach by his employers of their contract with him.

Astbury J. held on the evidence that the defendants had conspired to injure the plaintiff by obtaining his dismissal simply because he would not forsake his own union and join that of the defendants, and that they had induced and intentionally procured a direct breach of contract by his employers. He accordingly gave judgment for the plaintiff, the damages being assessed at 75*l*.

The defendants appealed.

The following statement of facts is taken from the judgment of the Master of the Rolls: "The plaintiff was a member of the Workers' Union and in 1915 he entered the employment of Messrs. Meek and Dean who traded as the Leamore Currying Co. Soon after entering the employment he was asked to join the Curriers' Union. The matter was first suggested to him by Mr. Dean, one of his employers, who did so because he wished to have only one union to deal with in his negotiations with his men. The plaintiff declined to join, and nothing further happened; but in 1916 a man named Mead, who at that time occupied the position of 'my Lord' at the Leamore works which the defendant Riley afterwards occupied, saw the plaintiff at the request and the instance of the men and again asked him to join the Curriers' Union, which he refused to do, as he would be obliged, if he did so, to leave the Workers' Union. Therefore although the question had then arisen no action was taken upon it.

"In 1919 the matter seems to have been raised again by a man named Hardwick who asked if the plaintiff had joined

the union. The defendant Wood had at that time come to work in the shop, and the learned judge has found that Wood was really the cause of all the trouble; that he was a mischief-maker who stirred up mischief and that it was through him that all the trouble resulted. I will accept the finding of the learned judge in this sense, and I think it is only correct in this sense, although even so I think there is very little evidence to support it, that Wood being a member of the executive of the district committee of the Curriers' Union and being perhaps a keener trade unionist than some of the other men was more anxious that that union should insist upon the position that they had taken up. To that extent I am quite content to accept the learned judge's finding; but if it means that he stirred up mischief from any personal motive or any malicious motive towards the plaintiff, in my opinion there is no evidence whatever to support it. Indeed so far as personal feelings and personal motives go the evidence of all the witnesses is unanimous that there was no personal feeling at all between the parties. They were all good friends, but they were not agreed as to whether the plaintiff was to be allowed to work in the shop, and I daresay that when the defendants and the others there asserted what they thought was their right to make him either join their union or go, the plaintiff did not entertain the same affectionate feeling towards them. But so far as personal malice or motive goes there is no evidence of any kind, and in that sense I do not think Wood can be said to be a mischief-maker.

"The evidence that the plaintiff gave of what happened in 1919 was this: He said that Wood approached him in August, 1919, and asked him to join the Curriers' Union, that he replied that he would not if he could not remain in the Workers' Union, and that Wood then said that the men would refuse to work with him and that that would mean trouble. Wood asked for an answer, Yes or No, and the plaintiff gave the answer No. Wood's evidence is substantially to the same effect. He said that on that occasion in August he told the plaintiff that the Leather Trade Federation would not admit the

C. A.
1920
WHITE
v.
RILEY.

C. A.
1920
WHITE
v.
RILEY.
—

Workers' Union to membership and to get their rate he would have to join. Wood said that the plaintiff replied that he had seen the officials of the Workers' Union, and that if there was any trouble the Workers' Union would support him. Wood also said that on that occasion he did not tell him that the men would refuse to work with him. That is one of the matters on which they are at variance, and, following what the learned judge says, I will accept the plaintiff's statement that he did say that there would be trouble and that the men would not work with him.

"The matter then went on until November 21 when there was a meeting in the shop when this matter of the plaintiff was discussed, and Riley was deputed to see him. The evidence of the plaintiff as to what then took place was this: He said Riley came to him and said: 'I have been appointed by the shop to ask you if you would join and I said No.' Riley gave the same account. He said: 'It was proposed and seconded at the meeting that I should approach the plaintiff to join the union; I told him and he said having had a conversation with some one in the Workers' Union he had decided not to join.' Then there comes the important meeting of the shop on November 28 when the matter was again discussed. Riley having reported the interview that he had had with the plaintiff, a discussion followed, and it was proposed that he should join, and it was decided that if he did not they would give notice to cease work. Thomas Wood, the defendant Wood's brother, drafted a letter which was signed by Riley on behalf of the shop. It is addressed to the firm and was in the following terms: 'Sirs, We hereby give you notice that we shall cease work on Friday next unless E. White either joins our Society or leaves your employment.' That letter is in effect the overt act of conspiracy to intimidate and threaten, followed by some other acts no doubt, but that is the first one. That letter was given to Mr. Meek, who was not called at the trial, but there is no doubt, I think, what passed. Mr. Meek had no power to deal with it, and he said he would send for the plaintiff, because he could not have the works upset for one man.

The letter was also given to the plaintiff. The plaintiff said it was not for him and that it ought to be given to the office. He was told that it was to give him another chance, that is to say, if he would then join all would be well.

“The matter then went on to December 1. Mr. Dean, the other employer, tried to settle the matter in the meantime, but nothing happened. On December 1, the defendant Riley and Thomas Wood saw the employers and something was said about withdrawing the notice. On December 5 there was a meeting of masters and men in the currying trade in the Walsall district and the defendant Wood, as one of the men’s executive, was there. It was to discuss a variety of things which the Curriers’ Union wanted done. Mr. Dean reported to that meeting what had happened with regard to the plaintiff and the masters thereupon refused to proceed further with the conference until the notice had been withdrawn. Thomas Wood says that they wanted it withdrawn for a week in order that it might come into a line with other notices that had been given for all curriers in Walsall to cease work in a week owing to a dispute between the curriers and the employers about non-union and female labour. Of course for the purpose of this case the plaintiff would be considered as a man engaged in non-union labour, although he belonged to the Workers’ Union, because the Curriers’ Union for this purpose would regard everybody else as being non-unionists. Apparently the members of the executive did not see any objection to withdrawing the notice, but they thought they could not do so without consulting the shop, because it was a notice from the shop and not from the union. They therefore went back, and saw the men at the shop, and the men at the shop declined to withdraw the notice, and I think the defendant Wood said that he thought the notice ought to be withdrawn. They returned and told the employers that it would not be withdrawn, and the result was that the employers, finding that the notice would not be withdrawn, gave notice suspending the plaintiff, and afterwards discharged him.

“There was a conversation as to what was to happen

C. A.
1920
WHITE
v.
RILEY.
—

C. A.
1920
WHITE
v.
RILEY.
—

about his week's wages, and it is on this and on what took place with regard to it that the question of breach of contract turns. There is no direct evidence as to what were the terms of the plaintiff's employment. He was working on piecework and therefore it was quite possible that he was not entitled to any notice at all, but it was assumed throughout by the employers, the plaintiff and the defendants that he was working on terms which would entitle him to a week's notice or a week's wages in lieu of notice, and it seems to me that the whole matter proceeded on the assumption that if he received his week's wages there would be no breach of contract although he did not receive his week's notice. Now that may or may not be right. It may be that he was employed on such terms that he was not entitled to any notice at all. It may be that he was employed on such terms that he should receive a week's notice, and that paying him a week's wages would only be compensation for a breach of the contract to give him a week's notice. It may be that he was employed on the terms that his employment might be terminated either by a week's notice or by payment of a week's wages, and the evidence so far as it goes seems to me to show that the third of those methods of employment was the one that was assumed to exist by all parties concerned with the matter. The notice had been served upon November 28, which would have given the employers just time to give notice terminating the employment on December 5, but that notice had not been given and the men at the interview, the defendant Riley and Thomas Wood and the employers and the plaintiff all knew that the notice had not been given, and the question was raised as to what was to happen with regard to the week's wages.

"Mr. Dean's evidence as to that was this. He says: 'We could not afford a strike and we were reluctantly compelled to suspend the plaintiff'—and it is right perhaps here to say that the plaintiff was an entirely satisfactory workman working at the proper trade union wages for skilled men and that there was no objection whatever to him except that he was not a member of the Curriers' Union. Riley and

Wood's brother said they would find a week's wages in lieu of notice if it was wanted, and Dean said: 'I paid the plaintiff only on the wages up to date.' With regard to that matter Riley says: 'We reported that we should not withdraw the notice to the employers and they said they were sorry and asked whether if they did not pay wages in lieu of notice we would, and later we agreed to do so.' The result was that the men agreed to find the week's wages for the plaintiff which he had not been paid. Riley says that later Dean, the employer, said that he would not have anything to do with that, and one of the men says that the way they were going to find the money was that they authorized the employers to stop the money out of their wages in order to pay it to the plaintiff."

C. A.

1920

WHITE

v.

RILEY.

The appeal was heard on July 21, 22, 23 and 26, 1920.

Micklem K.C. and *Howard Wright* for the appellants. It is said that the defendants have been guilty of inducing a breach of contract. There is no evidence to support that contention. The law is clearly laid down in *Allen v. Flood* (1) in various passages in the opinions of the noble and learned Lords which are conclusive of the present case. The effect of the decision in *Allen v. Flood* (1) is explained by Lord Halsbury in *Quinn v. Leatham*. (2)

[They also referred on this point to *Gaskell v. Lancashire and Cheshire Miners' Federation* (3) and *Valentine v. Hyde*. (4)]

There are three cases which are relied upon by the respondent as being against our contention—namely, *Giblan v. National Amalgamated Labourers' Union* (5); *Conway v. Wade* (6); and *Larkin v. Long*: (7) There is no analogy between *Giblan's Case* (5) and the present. *Conway v. Wade* (6) is very far removed from this case. The decision in *Larkin v. Long* (7) was inevitable on the findings of the jury in that case. In *Hodges v. Webb* (8) Peterson J.

(1) [1898] A. C. 1, 96, 129, 131,
138, 147.

(2) [1901] A. C. 495, 506.

(3) (1912) 28 Times L. R. 518.

(4) [1919] 2 Ch. 129.

(5) [1903] 2 K. B. 600.

(6) [1909] A. C. 506.

(7) [1915] A. C. 814.

(8) [1920] 2 Ch. 70.

C. A.
1920
WHITE
v.
RILEY.

held that in the absence of conspiracy or unlawful combination, a statement by one person that unless the person whom he is addressing consents to the adoption of a particular course which he can lawfully take, the speaker will do that which he is lawfully entitled to do, is not a threat for which the speaker can be held liable at law. No conspiracy or unlawful combination to injure the plaintiff by obtaining his dismissal is proved here, nor were the defendants guilty of inducing and intentionally obtaining a direct breach by the employers of the plaintiff's agreement of service.

Again Astbury J. has held that the defendants are not protected by the Trade Disputes Act, 1906. The learned judge went into that matter in *Valentine v. Hyde* (1), but it is submitted that this Court ought to review that decision. There was here clearly a dispute between "workmen and workmen" within s. 5, sub-s. 3, of the Act. The definition of "Trade dispute" in that section is very wide, and the defendants are entitled to the protection afforded by ss. 1 and 3.

[They also referred to *Davies v. Thomas*. (2)]

Luxmoore K.C. and *H. H. Slessor* for the respondent. The question is whether the defendants were guilty of any illegal act in procuring the dismissal of the plaintiff. The breach of contract was procured by a combination of the workmen. If the determination to strike is for the purpose of injuring another that is an actionable wrong.

[LORD STERNDALÉ M.R. My difficulty is this: Is there any evidence of coercion or intimidation apart from the statement made to the employers that if they retained the plaintiff the men would strike?]

There is evidence of a conspiracy to get rid of the man from the works. There was no "trade dispute" here. It is submitted that there was no dispute "between employer and workmen," nor "between workmen and workmen" connected with the employment "of any person" within s. 5, sub-s. 3, of the Act. The defendants are not therefore entitled to the protection of the Act.

(1) [1919] 2 Ch. 129.

(2) [1920] 2 Ch. 189.

In *Valentine v. Hyde* (1) Astbury J. says : " Suppose, for instance, that one workman with some power in that behalf threatened another that, unless he would pay him money, he would get him discharged from his employment. This would be connected with the other's employment in one sense, but would plainly not be a trade dispute within the meaning of the Act." We adopt that statement as part of our argument. The Court is without guidance unless it reads into s. 5, sub-s. 3, the word " directly " before the words " connected with the employment." It might be argued that the refusal to pay a fine to a trade union was subversive of the interests of the men. The words " directly connected with the employment " apply primarily to a dispute between workmen and employer. If the words " connected with the employment " mean that the members of a trade union may object to a man on any ground it follows that an objection to the colour of a man's hair or to his religion or politics may be a dispute connected with the employment.

Trade union membership is not directly connected with the workman's employment. The dispute to come within the Act must be with reference to something directly connected with the work. In *Conway v. Wade* (2) it was held that a dispute with reference to the non-payment of a fine imposed by a union on one of its members was not a " trade dispute " within s. 3 of the Act of 1906. Here the dispute was as to non-payment of a subscription. On the facts of the present case so far were the members of the executive of the Curriers' Union from thinking that there was any trade dispute that they went down to the shop to endeavour to induce the men to withdraw the notice. On the evidence whatever the dispute was it was limited to the shop, and the personal grumblings of the men had not reached such a point as to become a trade dispute : *Larkin v. Long* (3) ; *Conway v. Wade*. (2)

As to the further finding that if there was any unlawful coercion s. 3 of the Act would not apply. Peterson J. in

C. A.
1920
WHITE
v.
RILEY.

(1) [1919] 2 Ch. 129, 151.

(2) [1909] A. C. 506.

(3) [1915] A. C. 814.

C. A.
1920
WHITE
v.
RILEY.

Hodges v. Webb (1) agrees with Astbury J. that if there be threats s. 3 does not apply and then there is no statutory protection in any event.

There is a distinction between a warning and a threat. A neutral intimation of what may happen in a certain event is a warning: a desire to bring it about is a threat. Here each individual workman had a right to strike, but a combination to force the employers' hand was unlawful. There was here an oppressive combination by the workmen against their employers. They knew that the employers would be compelled to yield, as they could not stand a strike. Such a combination is, it is submitted, an unlawful conspiracy and constitutes a good cause of action against the defendants: *Reg. v. Hewitt* (2); *Reg. v. Duffield*. (3) A wide interpretation should be given to the word "threat": *Pratt v. British Medical Association*. (4)

As regards the breach of contract all parties thought that the payment of wages in lieu of notice would cure the breach. Knowing that, they nevertheless procured it. The judge found that there was a breach and there was ample evidence to support his finding.

Micklem K.C. was not called upon to reply.

LORD STERNDALÉ M.R. This is an appeal from Astbury J., who gave judgment in favour of the plaintiff in this action. We have had an interesting discussion of the law on the matter, but, with the exception of one or two points, I do not think it is necessary for me to go into the question of the law, because, as happens in so many cases, when the matter has been fully argued it is found that the greater part of its solution turns upon questions of fact. The learned judge has here made two findings of fact, one of which is vital, and if supported, gets rid of any question of law. In order to understand them, it is just as well to see the nature of the action.

The plaintiff is a person called a "buffer" working in the

(1) [1920] 2 Ch. 70, 85.

(2) (1851) 5 Cox C. C. 162.

(3) (1851) 5 Cox C. C. 404.

(4) [1919] 1 K. B. 244.

leather trade. He is also a member of a union which is now shortly called the Workers' Union. The defendants are persons who were also working in the same concern, known as the Leamore Currying Co. They were members of the Curriers' Union. The defendant Riley occupied a position of seniority which entitled him apparently to the designation of "my Lord" in the shop; but he had in fact no more actual authority than any other workman in the shop. He presided at meetings of workmen, and if any representations had to be made to the employers he made them on behalf of the men. The defendant William Wood had no position which entitled him to titular rank; but he was perhaps quite as important a person in the shop as Riley, or more so, because he was a member of the District Executive of the Curriers' Union and, as such, he would have considerable influence.

C.A.
1920
WHITE
v.
RILEY.
Lord Sterndale
M.R.

The action was brought against the defendants charging them with having conspired during the months of August to December, 1919, by threats, intimidation, coercion or otherwise to procure cause and induce the employers to threaten to terminate their contract of employment with the plaintiff unless he left the Workers' Union and joined the Curriers' Union and with having, by such action, on December 5, 1919, caused the employers to suspend the plaintiff from his employment and to abstain from continuing him therein. The learned judge has found that in so doing the defendants were guilty of a wrongful or illegal conspiracy to threaten the employers and to cause them by intimidation to dismiss the plaintiff. If the learned judge's finding be right that this was a malicious conspiracy by threats and intimidation to get the plaintiff discharged, then of course there is an actionable wrong committed and the defendants are liable, and no question as to the meaning and effect of the Trade Disputes Act, 1906, arises. Therefore that is, as I ventured to call it before, a vital finding of fact. If that can be supported, the appeal fails altogether.

The learned judge has made another finding of fact—namely, that the defendants knowingly and wrongfully induced the

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C. A. employers to commit a breach of the contract with the
1920 plaintiff. That is actionable unless it can be brought within
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v. that Act, then if it be only an inducement to break a con-
RILEY. tract of employment it is not actionable by reason of s. 3
of that Act.

Lord Sterndale
M.R.

The first and the most important question is : Does the evidence support the first finding of malicious and wrongful conspiracy to injure ? Of course, we have to approach that question from the point of view from which this Court always approaches findings of fact in the Court below upon viva voce evidence. I need not repeat the principle that has been so often laid down. It really comes to this, that this Court will not interfere unless it is quite clear that the evidence does not support the finding. Now in this case I regret to say that I do not think the evidence does support the finding. If there was a finding of disputed fact resting upon contradictory evidence and the learned judge had believed one side and disbelieved the other, I should not think of interfering, but I have looked through the evidence with some care and I cannot find that on any material points the witnesses on either side differ. There are some slight differences which are to my mind immaterial. The defendant Wood, for instance, says that at the interview, to which I shall refer later, he did not say there would be any trouble with the men. The plaintiff says that he did. Let us accept the plaintiff's evidence as against the defendant Wood's for that purpose. I really think that is the only, or almost the only, point on which they differ which could be supposed to be material at all.

The history of the case is as follows : [His Lordship stated the facts and the result of the evidence as above set out and continued :] Those are the facts with regard to the matter. The question is whether upon that evidence the finding of wrongful conspiracy to threaten and intimidate can be supported. There is no act in the matter showing such a conspiracy except the sending of the letter to the employers and the refusal to withdraw it on December 5.

There are no other threats which are expressly stated in the evidence, nor is there any conduct beyond the actual giving of the notice and the refusal to withdraw it from which any further threat or intimidation can be inferred. I think it is quite clear that the mere statement to an employer by a number of workmen that they will not work with another workman and that if that workman is retained in the employer's service they will strike is not of itself actionable: see the statement of Lord Watson in *Allen v. Flood*. (1) The dispute there was that some men were objectionable, not personally, but because of trade union matters, to the boiler-makers who were working at the Regent Dock, Millwall, and the noble and learned Lord says: "That the boiler-makers who were employed at the Regent Dock, Millwall, did seriously resent the presence among them of the respondents very plainly appears from the evidence of the respondents themselves; and that they would certainly have left the dock had the respondents continued to be employed appears to me to be an undoubted fact in the case. They were not under any continuing engagement to their employers, and, if they had left their work and gone out on strike, they would have been acting within their right, whatever might be thought of the propriety of the proceeding. Not only so; they were, in my opinion, entitled to inform the Glengall Iron Co. of the step which they contemplated, as well as of the reasons by which they were influenced, and that either by their own mouth, or, as they preferred, by the appellant as their representative." Now that is a clear statement that if a set of men object to work with another man or another set of men they have a perfect right to say that they will not work with him any longer; and, more than that, they have a perfect right to tell their employer what they are going to do. It is sometimes expressed by saying that they have a right to give him a warning, but they have not a right to threaten. Of course both of those words are difficult to define, and I prefer to say that they have the right to make the statement to him that they are going to do it,

C. A.

1920

WHITE

v.

RILEY.

Lord Sterndale
M.R.

(1) [1898] A. C. 1, 99.

C. A. 1920 and that whatever epithet or substantive you may apply to it, if they do not go beyond that there is no cause of action.

WHITE
v. ²⁴
RILEY.

Lord Sterndale
M.R.

Lord Herschell says much the same thing. I am glad to see that he considered, as I do, that the words "threat and coercion and intimidation" are sometimes used without accurate consideration of the meaning which it is intended to attach to them. He says (1): "On the other hand it is undeniable that the terms 'threat,' 'coercion,' and even 'intimidation,' are often applied in popular language to utterances which are quite lawful and which give rise to no liability either civil or criminal. They mean no more than this, that the so-called threat puts pressure, and perhaps extreme pressure, on the person to whom it is addressed to take a particular course." Then with regard to the question of what men are entitled to do, he says: "I understood it to be admitted at the Bar, and it was indeed stated by one of the learned judges in the Court of Appeal, that it would have been perfectly lawful for all the ironworkers to leave their employment and not to accept a subsequent engagement to work in the company of the plaintiffs. At all events, I cannot doubt that this would have been so. I cannot doubt either that the appellant or the authorities of the union would equally have acted within his or their rights if he or they had 'called the men out.' They were members of the union. It was for them to determine whether they would become so or not, and whether they would follow or not follow the instructions of its authorities, though no doubt if they had refused to obey any instructions which under the rules of the union it was competent for the authorities to give they might have lost the benefits they derived from membership." Lord Macnaghten gives the same opinion. I can find nothing more in the present case than the statement to the employers that if the plaintiff did not join the Curriers' Union or leave the employment the other men would refuse to work for them. That no doubt in a sense may be said to have coerced the employers. The employers did not wish to dismiss the plaintiff; but they dismissed him rather than

(1) [1898] A. C. 1, 129.

have their whole business upset by the other men leaving their work. Whether that was right or whether it was wrong from a general point of view I have nothing to do with. I have the ruling of the House of Lords in *Allen v. Flood* (1) that it does not of itself constitute actionable intimidation or coercion, and that is all with which we are concerned in this case, and I have the ruling also that it does not constitute such an actionable wrong even if it is done by a number of persons, because Lord Macnaghten expressly contemplated the case of the men all going themselves, if they think fit, or, if they do not all go in person, going by a representative, and telling the employer that they will not work any longer with the other man, and if they all go together it is obviously done in combination. If they all go, not in person, but in the person of a delegate, it is also done in combination. Therefore it seems to me that here since they were obviously doing nothing more than stating what they would do if the plaintiff did not join their union or leave there is no actionable wrong within the decision of *Allen v. Flood*. (1) But it has been argued that there must be such a wrong, because the defendants knew or must be taken to have known that the employers would have to give in, as one of the partners said when the notice was given that they could not have their works upset for one man, and the defendants must have known that they were putting pressure upon the employers which must succeed. How that can make any difference as to whether what they do is an actionable wrong or not, I have been unable to see. It is possible that in some circumstances it might be a fact tending to show that the action of the defendants was not bona fide from a trade union point of view, but that they were doing it from some malicious motive towards the plaintiff; but the whole of the evidence in this case entirely negatives any such conclusion as that, and I fail to see how an act which is not an actionable wrong if it is thought it will succeed becomes an actionable wrong because it is known that it will. It seems to me that there

C. A.

1920

WHITE

v.

RILEY.

Lord Sterndale
M.R.

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C. A. is no logical distinction between the two cases, and, therefore,
1920 on the first and main ground, in my opinion, the evidence
WHITE does not bear out the finding of the learned judge.

v.
RILEY.

Lord Sterndale
M.R.

With regard to the second point, it is not enough to show that the defendants have in fact procured a breach of contract. They must have done so knowingly and intentionally. It has been so stated in all the cases. In this case, as I have already said, in my opinion all parties, the employers, the plaintiff, and the defendants, were of opinion that there was no breach of contract if the plaintiff received either a week's notice or a week's wages in lieu of notice. If we are to infer the terms of the employment from the very fragmentary evidence there is on the point, it seems to me that the evidence would rather point to those being the terms of his employment, because they were accepted as being so by everybody. When the question of wages was raised, the men at once said that they would themselves find the week's wages. The learned judge has said that they agreed to indemnify the employers against the consequences of dismissing the plaintiff without notice, thereby assuming that there was an actionable wrong. The word "indemnify" seems to suggest holding harmless from some liability which has been incurred. I do not think that that is the true view of the position. I think they were finding the money in order that the employers might not be at a loss by having to pay out of their own pockets the wages which were necessary in order to make a proper termination of the plaintiff's contract of service. As a matter of fact those wages were never paid; but that does not seem to have been the fault of the men. For some reason or other, after they had made the arrangement with the employers that the men should pay and that the employers should stop the amount out of their wages, the employers declined to go on with the matter. I do not know what the reason was at all. The failure to carry out this arrangement was not brought about by the men. Therefore if there was a breach of contract in not paying the wages it was not in my opinion caused by the men's conduct. I think, therefore, altogether apart from the

Trade Disputes Act, 1906, that there was nothing to sustain the finding of any actionable wrong against the defendants.

As however we have had a good deal of discussion upon the Trade Disputes Act, 1906, I think I had better deal with the point. The Act no doubt was passed to a certain extent in view of statements which had been made in *Quinn v. Leatham* (1) and in other cases. Sect. 1 provides: "The following paragraph shall be added as a new paragraph after the first paragraph of section 3 of the Conspiracy and Protection of Property Act, 1875: 'An act done in pursuance of an agreement or combination by two or more persons shall, if done in contemplation or furtherance of a trade dispute, not be actionable unless the act if done without any such agreement or combination would be actionable.'" I do not know that very much turns upon that section, certainly not in view of the conclusion to which I have come, that there is here nothing actionable whether the act be done either by one or by many; but it is perfectly obvious, I think, that if one man goes to his employer and says: "I will not work for you any longer if A. B. continues in your employment," that is not actionable, and that if there be a trade dispute here and if it were necessary to have resort to the section, the section would make it not actionable if it were done by the combination of the whole shop. In my opinion it is not necessary to have resort to that section, but if it be a trade dispute that would deal with the case. Then s. 3 provides: "An act done by a person in contemplation or furtherance of a trade dispute shall not be actionable on the ground only that it induces some other person to break a contract of employment or that it is an interference with the trade, business, or employment of some other person, or with the right of some other person to dispose of his capital or his labour as he wills." Therefore, assuming that there was a breach of contract in getting rid of the plaintiff on December 5 without the payment of his wages for the week, that would be protected by the Act if there was in fact a trade dispute. Now the definition of a trade

C. A.

1920

WHITE

v.

RILEY.

Lord Sterndale

M.R.

(1) [1901] A. C. 495.

C. A. 1920
 WHITE
 v.
 RILEY.
 Lord Sterndale M.R.

dispute is in sub-s. 3 of s. 5, and is as follows: "The expression 'trade dispute' means any dispute between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment, or the terms of the employment, or with the conditions of labour, of any person, and the expression 'workmen' means all persons employed in trade or industry, whether or not in the employment of the employer with whom a trade dispute arises." The words "between workmen and workmen" are an addition to the earlier Act of 1875, and were probably added in view of what was said in *Quinn v. Leatham* (1) and other cases, that a dispute of this description would not be a dispute between employers and workmen, which was the only dispute protected by that Act.

It was suggested that the words "which is connected with the employment or non-employment of any person" in the sub-section do not apply to a dispute between workmen and workmen. I cannot follow that. It seems to me that you cannot read the sub-section in that way, and, therefore, that a dispute between workmen and workmen which is connected with the employment or non-employment of any person is a trade dispute.

Now was there a trade dispute in this case? That, in my opinion, is a question of fact. It has been so treated in several cases, and being a question of fact it is not easy nor indeed possible to lay down any general rule which would apply to all cases. We have to see what is the circumstance to which we have to apply our minds in determining the question of fact in this case. It seems to me that there is no doubt that there was a dispute between the two unions, the Curriers' Union objecting to the Workers' Union including in their membership craftsmen such as the plaintiff and to their negotiating with the employers on behalf of such men, and they insisted that all craftsmen should be members of their union. To this the Workers' Union would not agree. There was therefore a dispute between the two unions on this point. We have had a good deal of discussion

as to whether it was a burning question or not. I rather agree with the learned counsel for the respondents that it did not burn very brightly, but there was the dispute, there is no question about that, and in accordance with and by reason of the attitude of the two unions the plaintiff soon after he went to these works was asked to join the Curriers' Union. It was suggested to him by one of his employers and by Mead and by Wood, and he refused in each case unless he was allowed still to remain a member of his own union. In 1919, as I have said before, the matter was raised in a more acute form, partly in consequence of a question put by Hardwick and partly, I dare say, by the intervention of the defendant Wood, who was one of the executive of the Curriers' Union. The result of it was that the plaintiff was told that the men would not work with him unless he did join and that if he did not either join or leave the employment they would cease work. He was quite willing, as he said, to join if he could remain in his own union, but that they would not allow. In those circumstances, it seems to me that the only fair conclusion of fact is that there was a dispute between workmen and workmen in connection with the employment of a person—namely, the plaintiff, the dispute being that the men in the shop insisted that no skilled man should be employed unless he belonged to the Curriers' Union, and that this dispute arose because of the restrictions which the union thought fit to put upon the employment of persons as buffers, in what they thought was the interest of their union, and its members, and, perhaps in the interest of the trade at large.

It is said that this conclusion is inconsistent with the case of *Conway v. Wade* (1) and *Giblan v. National Amalgamated Labourers' Union* (2), but I do not think that is so. The facts in those cases were different. The complaint which the other workers had against the plaintiffs in those cases and the cause of their refusing to work with them were not matters in connection with the regulation of employment in the trade, but were matters of complaint against the personal

(1) [1909] A. C. 506.

(2) [1903] 2 K. B. 600.

C. A.

1920

WHITE

v.

RILEY.

Lord Sterndale
M.R.

11

CF 1905/23

C. A. conduct of the plaintiffs as members of their union. It was
1920 truly said by the learned counsel for the respondents that
WHITE it is very difficult to draw a line between what is a trade
v. dispute and what is not. It is always the case in questions
RILEY. of fact, and I do not intend to attempt a general defini-
Lord Sterndale tion. I must, however, say that I prefer the reasoning of
M.R. Peterson J. in *Hodges v. Webb* (1) to that of Astbury J. in
Valentine v. Hyde (2), and I think it is really almost a reductio
ad absurdum of this section to say, as the respondents are
bound to say, that it does not include any dispute between
union and non-union men and that if union and non-union
men are working in the same employment and the union
men say, "We will no longer work with the non-union
men unless they join our union," that is not a dispute
between workmen and workmen connected with the employ-
ment or non-employment of any person. It seems to me
that that is contrary to the words of the section. I do not
think it is necessary to say where the limitation lies which
is to be put upon this section. It is a question of fact in
each case and I decide the question in the present case as a
question of fact. It is quite possible that the extension of
this legislation, which was originally passed for the benefit
of workmen in their disputes with their employers, to disputes
between workmen and workmen, has produced results which
many workmen in some trade unions did not anticipate, but
it does not seem to me that that is any reason for not giving
to the sub-section its natural meaning. I do not think it
necessary to consider whether there was or was not a dispute
between "employers and workmen." I do not at all say that
there was or not, and I do not say that this action of the
men in the shop could not be considered to be taken in
furtherance or contemplation of a dispute between employers
and workmen, because it may very well be that when they
had once intimated to the employers that the plaintiff ought
to join their union, and they knew that the employers
wished to retain him in their service, the action which
they took with regard to the employers after that may

(1) [1920] 2 Ch. 70.

(2) [1919] 2 Ch. 129.

have been in contemplation of a dispute between the workmen and the employers. I think this is quite a possible construction also, but, as I think the case comes within the words "a dispute between workmen and workmen," I do not think it necessary to give any decision on that point.

I think that this appeal should be allowed, and that judgment should be entered for the defendants with costs here and below.

C. A.

1920

WHITE

v.

RILEY.

Lord = Sterndale
M.R.

WARRINGTON L.J. I am of the same opinion. The grounds upon which such an action as the present can be founded have been stated by Lord Watson in addressing the House of Lords in *Allen v. Flood*. (1) He there says: "There are, in my opinion, two grounds only upon which a person who procures the act of another can be made legally responsible for its consequences. In the first place, he will incur liability if he knowingly for his own ends induces that other person to commit an actionable wrong. In the second place, when the act induced is within the right of the immediate actor, and is therefore not wrongful in so far as he is concerned, it may yet be to the detriment of a third party; and in that case, according to the law laid down by the majority in *Lumley v. Gye* (2), the inducer may be held liable if he can be shewn to have procured his object by the use of illegal means directed against that third party." It is for the plaintiff to establish that one or other of those two grounds exists in the present case. The learned judge has held, by findings to which I will presently refer, that the plaintiff has established both grounds of complaint. With all respect to the learned judge I do not think that he has established either.

The facts have already been stated by the Master of the Rolls, and it is quite unnecessary for me to go over them again; but I must just give a short summary. The plaintiff and the two defendants were in the year 1919 employed as curriers under the same employer, the Leamore Currying Co., which consisted of two gentlemen carrying on business

(1) [1898] A. C. 1, 96.

(2) (1853) 2 E. & B. 216.

C. A. in co-partnership. The defendants were both of them, as
1920 were all the men employed in the shop except the plaintiff,
WHITE members of an old craft union, which I will call, for shortness,
v. the Curriers' Union. It was a craft union that was estab-
RILEY. lished some 200 years ago, its object being to protect the
Warrington L.J. interests of workmen who were by their calling curriers, and
those alone. The Curriers' Union comprises only, I think,
skilled workers in the curriers' trade. The plaintiff was a
member of a large omnium gatherum union called the
Workers' Union, which comprises amongst its members skilled
workmen and non-skilled labourers of all classes not confined
to any particular craft, but ready to welcome as a member,
any artisan or labourer whatever may be the nature of his
employment. It appears to be the policy of the craft union
to insist so far as may be that the workers in the craft
should be members of the Union and should not belong to
such a union as the Workers' Union in order that the craft
union, who devote themselves to the interests of that craft
in particular, may be the persons and the only persons who
shall be entrusted with the duty of negotiating with the
employers and furthering the interest of the men employed
in that craft. That in itself is a perfectly reasonable and
intelligible policy. It is for the consequence of carrying out
that policy in this particular shop that the two defendants
are sued in the present action. It is said, first, that they have
knowingly procured from the employers the breach of their
legal obligations to the plaintiff, that is to say, a breach on
their part of the plaintiff's contract of employment, and,
secondly, that they have by illegal means procured the non-
employment of the plaintiff by the employers without any
breach of contract on his part. On the pleadings as
explained by a certain admission made upon an application
for particulars (that is putting aside for the moment the
breach of contract which is only very vaguely pleaded), the
procuring of the refusal by the employers to employ the
plaintiff is said to have been brought about by threats,
intimidation and coercion; but that was limited in the way
I have suggested to this—that the threats, coercion and

intimidation complained of are that the defendants threatened the employers that the labour of the workmen in the defendants' union would be withdrawn from the employers, and so coerced and intimidated the employers. The only so-called threat of which any evidence was given consisted of a letter signed by the defendant Riley, and written on behalf of the men who had been present at the shop meeting. [His Lordship read the letter and continued :] No other threat is alleged except that, at a subsequent meeting between the men and the employers, the men, through their spokesman, determined to adhere to the notice which they had already given.

C. A.
1920
WHITE
v.
RILEY.
Warrington L.J.

Now the question arises, is the giving of a notice of that kind on behalf of the men a wrongful act, I mean at common law quite independently of the Trade Disputes Act, 1906 ? That an act of that kind done by an individual is not at common law a wrongful act is I think quite plain from the decision in *Allen v. Flood*. (1) An act of that kind done by a number of men is, to my mind, shown not to be an unlawful act at common law, not directly by the decision in *Allen v. Flood* (1) but by the judgments at all events of three of the noble and learned Lords who addressed the House in that case—namely, Lord Watson, Lord Herschell and Lord Macnaghten. I propose to read a short passage from Lord Watson's speech in the House of Lords ; but I would further point out this as the result of what, to my mind, those three noble and learned Lords express to be the law. It is lawful for one man to withdraw his work, or for any number of men to withdraw their work, and to allege as the reason for the withdrawal that they refuse to work while a certain man or class of men is employed by those employers, and it would be an extraordinary conclusion that although it is lawful for them to withdraw their work it is unlawful for them to intimate to their employers their intention of doing so ; if that is the law then it amounts to this, that what is now commonly called a lightning strike would be legal, whereas a strike taking place after

(1) [1898] A. C. 1.

C. A.
1920
WHITE
v.
RILEY.
Warrington L.J.

notice would be illegal. That I am right in what I have just said as to my view of the law as laid down by the noble and learned Lords whom I have mentioned is I think shown quite plainly by the following passage from Lord Watson's judgment (1): "It is, in my opinion, the absolute right of every workman to exercise his own option with regard to the persons in whose society he will agree or continue to work. It may be deplorable that feelings of rivalry between different associations of working men should ever run so high as to make members of one union seriously object to continue their labour in company with members of another trade union; but so long as they commit no legal wrong, and use no means which are illegal, they are at perfect liberty to act upon their own views." Then a little lower down he continues: [His Lordship read the passage quoted by the Master of the Rolls and continued:] There cannot be a clearer intimation, first, that the workmen were entitled as a body to withdraw their work if they pleased, and on the ground on which they did withdraw it, and, secondly, that they were entitled to intimate to the master the conclusion at which they had arrived, and to do that either singly or all together in a body, or by some person whom they chose to represent them.

I do not propose to read Lord Herschell's speech, but I wish to read a few words of Lord Macnaghten's speech in the same case. He says (2): "The jury found that the settlement of this dispute was a matter within Allen's discretion. The only way in which he could settle it was by going and seeing the manager. There was surely nothing wrong in that. There was nothing wrong in his telling the manager that the iron-men would leave their work unless the two shipwrights against whom they had a grudge were dismissed, if he really believed that that was what his men intended to do. As far as their employers were concerned the iron-men were perfectly free to leave their work for any reason, or for no reason, or even for a bad reason; any one of them might have gone singly to the manager, or"—and

(1) [1898] A. C. 1, 98.

(2) [1898] A. C. 1, 147, 148.

this is important for the present purpose—"they might have gone to him all together (if they went quietly and peaceably), and told him that they would not stay any longer with Flood and Taylor at work among them."

That what was done in this case was done quietly and peaceably there can be no doubt at all. The evidence is quite clear that the men had no personal grudge whatever against the plaintiff, and that all that they were anxious for was that he should join the Curriers' Union. So far as they were concerned it did not matter to them whether he also remained a member of the Workers' Union; but the Curriers' Union did object to his remaining a member of the Workers' Union. Incidentally he could only join the Curriers' Union by giving up his membership of the Workers' Union; but the object of the men was to obtain his accession to the Curriers' Union.

With reference to this part of the case the learned judge has found as a fact that the defendants were guilty, first, of conspiring by threats to injure the plaintiff by obtaining his dismissal from his employment, because he would not leave his own union and join the Curriers' Union. In my opinion that finding is not capable of being sustained on the evidence. They did not, in my judgment, conspire by any threat at all to injure the plaintiff. They did not conspire by any threat to obtain his dismissal from his employment: What they did seek to do was to secure that if he remained in the employment he should become a member of the Curriers' Union. What they did they did by means which, in my opinion, were perfectly lawful.

The second finding of fact by the learned judge is, that they were guilty of inducing and intentionally obtaining severally and in combination a direct breach by the employers of the plaintiff's agreement for service. That again, if possible, is even less to be supported on the evidence than the previous finding.

What happened was this. It was not proved what were the terms of the employment so far as concerns the right of the employers to terminate it; but it seems to have been

C. A.

1920

WHITE

v.

RILEY.

Warrington L.J.

C. A. assumed on both sides that the employers had the right
1920 to determine it either by giving a week's notice or in the
WHITE alternative paying a week's wages, and when it was intimated
v. to the men that the employers might have to pay the week's
RILEY. wages in lieu of notice and so avoiding a breach of contract,
Warrington L.J. the men in effect said to the employers: "We will pay the
wages; if you pay them you may deduct them from our
wages in the following week." It is true that the employers
for some reason best known to themselves and which was
not explained to us, did not subsequently carry that proposal
into effect. They did not pay the week's wages to the
plaintiff. But that was no fault of the men. The men
intended that the contract which they believed to be the true
contract should be carried out by the employers and that
they should terminate the plaintiff's service in the way in
which he was in their view, and apparently in the view of
all the parties concerned, entitled to have it terminated—
namely, by payment to him of a week's wages in lieu of
notice. The answer therefore to that claim is that the
defendants did not knowingly and intentionally endeavour
to induce or succeed in inducing the employers to commit
a breach of that contract. What they intended was to
avoid a breach of contract.

The second of the two grounds, or, rather, logically the first
of the two grounds stated by Lord Watson to be those on
which such an action as the present can be founded, in my
opinion is also not proved in the present case.

That being so it is really unnecessary to consider the
question of the construction and effect of the Trade Disputes
Act, 1906; but as it has been a good deal discussed and as
we have also had discussed before us the two cases of
Valentine v. Hyde (1) and *Hodges v. Webb* (2) I think that
I ought to say a few words about it. The discussion has
really turned upon s. 5, the definition section as to what
is a trade dispute, and I do not therefore propose to discuss
the two enacting sections. [His Lordship read s. 5, sub-s. 3,
and continued:] What is a dispute between employer and

(1) [1919] 2 Ch. 129.

(2) [1920] 2 Ch. 70.

workmen or between workmen and workmen which is connected with the employment or non-employment of any person? In my judgment that is a question of fact in every case. In the present case there was, I think, quite plainly a dispute between workmen and workmen and it was a dispute as to whether or not the plaintiff should, in the position in which he then stood in relation to the unions, be employed by the particular employers. In my opinion that was a dispute connected with the employment or non-employment of the plaintiff. It was also a dispute connected with the employment or non-employment of the other workmen because they were unwilling to continue in the employment if the plaintiff was also in that employment. On this point, I wish to say for myself that I cannot appreciate the reasoning of Astbury J. in *Valentine v. Hyde*. (1) He treats the matter as if the dispute was whether or not the workman in question should join the particular union. In my judgment that is only an incident in the dispute. The dispute is whether while he is not a member of the union to which the other men belong he should be employed by the employers. It is really a dispute as to the terms upon which he should continue in the employment. On this point I very much prefer the reasoning of Peterson J. in *Hodges v. Webb* (2) to the reasoning of Astbury J. in *Valentine v. Hyde* (1) and in the present case.

C. A.

1920

WHITE

v.

RILEY.

Warrington L.J.

The result, in my opinion, is that the illegal acts charged against the defendants in the present case have not been established, that the action fails and that the judgment pronounced for the plaintiff must be set aside and judgment entered for the defendants with costs here and below.

YOUNGER L.J. This, in my opinion, is not a case in which there is any real dispute of fact. It is however a case in which not only the facts themselves, but more particularly the proper inferences to be drawn from them, may strike different minds in different ways. We have found

(1) [1919] 2 Ch. 129.

(2) [1920] 2 Ch. 70.

C. A.
1920
WHITE
v.
RILEY.
Younger L.J.

that strikingly illustrated in the arguments we have heard. The learned judge was himself of opinion that the evidence justified him in inferring that the shop meetings at the Leamore Currying works of the workmen members of the Curriers' Union claimed to decide, as he puts it, whether and under what circumstances their employers and their fellow-workmen should be allowed to earn their daily bread, and he came to the conclusion that the action of the defendants complained of by the plaintiff in this action was in furtherance of that claim and regardless of all other considerations; and, although not in words, the arguments of counsel for the respondents were directed towards maintaining that view of the facts. The defendants on the other hand and their counsel used the facts which were proved in the case as indicating that the members of the Curriers' Union in pursuance of what may be called the principle of craft unionism have in their action in this case merely manifested what they conceive to be their justifiable objection to the continued employment at these works of the plaintiff who did not belong to their union, by exercising what they say is their undoubted right of refusing to continue to work for their employers unless the cause of their objection was removed. Now these may both of them be somewhat extreme views of the position really disclosed by the evidence; but however the case be stated, it is, I think, quite manifest that it raises for the consideration of those whom it may properly concern questions of trade union policy with reference to which there is room for acute differences of opinion. It may be that the action of the defendants and of the shop in this case towards the plaintiff would strike the minds even of many convinced trade unionists as neither considerate nor wise, nor, in the permanent interests of trade unionism itself, expedient. But with all such outside questions this Court has, in my opinion, no concern at all, and it must, I think, in all these cases always be vigilant to see that it is not influenced in its views of the facts or of the proper inferences to be drawn from them by any prepossession which on more general

principles it may in the particular case be tempted to feel with the policy or attitude of either one side or the other. We are in all these cases confronted with a claim by both parties to the dispute freely to exercise their own freedom of activity irrespective of the fact that such exercise may bring them into conflict with one another, and the passage in Lord Herschell's judgment in *Allen v. Flood* (1) which is quoted by Peterson J. in *Hodges v. Webb* (2), is, I think, equally apposite to this case as it was to the case before Peterson J.: "I am not behind my noble and learned friend," says Lord Herschell, "in the desire to preserve individual liberty. But I think it is never in greater danger than when a tribunal is urged to restrict liberty of action because the manner in which it has been exercised in a particular instance may be distasteful."

Here the learned judge has found that the defendants were guilty, first, of conspiring by threats to injure the plaintiff by obtaining his dismissal from his employment, because he would not leave his own union and join the Curriers' Union, and, secondly, of inducing and intentionally obtaining severally and in combination a direct breach by the employers of the plaintiff's agreement of service. Now speaking for myself I do not feel at liberty to concur in either of these findings, nor, in my view, are they justified by the facts proved in the Court below. As to the first the only evidence of threats which was given or relied upon by the plaintiff was the handing to one of the employers on November 28 of the letter of that date, already read by the Master of the Rolls, and the refusal of the shop or of the defendants to withdraw the letter on December 5. That the letter intimated to the employers that if one of two things with reference to the plaintiff did not happen the Curriers' Union men would leave the employers' service at the end of the week I do not doubt, but I do doubt whether that was a threat in a relevant sense. Further, the event which was there foreshadowed, if it was a threat, the men were lawfully entitled to bring about if

C. A.
1920
WHITE
v.
RILEY.
Younger L.J.

(1) [1898] A. C. 1, 142.

(2) [1920] 2 Ch. 70, 80.

C. A. they chose. It was part of the liberty of action which they
1920 themselves possessed and apart from intending or inducing
WHITE any breach of contract with the plaintiff—a question which
v. I will consider separately—I cannot myself see that there
RILEY. was anything actionable in their intimating beforehand
Younger L.J. their intention to exercise their liberty of action in that
respect. It so happens that although regarded and doubt-
less justly regarded by the learned judge as the leader of
the men in this matter, the defendant Wood was not one
of those who even handed the letter in question to the
employers, so that if the threat consisted in handing the
letter his responsibility in relation to that which is alleged
to be the threat is no more than that of any one of the men
who approved of its contents, and as to whom, I think, it
was not suggested that by such approval they threatened
the employers in the sense in which the word is used in such
a case. Nor is this a case in which the defendants threatened
to call out the men. The letter of November 28 embodied
the resolution previously come to by the men themselves,
but even if those who presented the letter—and that so far
as this action is concerned would extend to the defendant
Riley only—had so threatened the result so far as the
liability on this head is concerned would have been, in my
opinion, the same. This appears to me to be clear from the
judgment of Lord Herschell in *Allen v. Flood* (1), who again,
assuming no breach of contract, in terms stated that the
officials of the union could not have been sued merely for
calling out the members of the union any more than the
workmen themselves could have been sued for ceasing to
work. With reference to the action of the defendant Wood
who, I agree, took a very active part in advising, or, if you
like, leading, the men in this matter, I cannot find any
particular activity of his proved in the case which exposes
him to any special individual liability. After the men had
refused to continue to work with the plaintiff he did assure
them that the union would support them in their action.
It is said he induced them to agree, if necessary, to strike

(1) [1898] A. C. 1.

by making that statement, but if he did, the statement was, so far as anything has been shown in this case to the contrary, perfectly true, and I know not why he should not have made it if he chose. True, it is I think undoubted that Wood's craft unionism was an enthusiasm. It may even go further. He certainly is from his own point of view a purist in such matters, and he is entitled to be so if he thinks it right. But although his zeal in this case brought him in conflict with the plaintiff and the plaintiff's union, there is, so far as I can find in the evidence, nothing to show that he was actuated in anything he did by any malicious or vindictive feeling towards the plaintiff as a man, or that in any action he took or advised he acted otherwise than in the interests, as he conceived them, of craft unionism in general and the Curriers' Union in particular. And I do not fail to observe that his attitude is not exceptional, because one circumstance given in evidence as increasing the plaintiff's damages in this case is that no employment is open to him in Walsall at any shop where the workmen employed belong to the Curriers' Union. It follows, in my opinion, that apart from any question of breach of contract the plaintiff has not brought himself within the only ground which Lord Watson, in *Allen v. Flood* (1), stated made a person who procures the act of another legally responsible for its consequences—namely, that if “when the act induced is within the right of the immediate actor, and is therefore not wrongful in so far as he is concerned, it may yet be to the detriment of a third party; and in that case, according to the law laid down by the majority in *Lumley v. Gye* (2), the inducer may be held liable if he can be shown to have procured his object by the use of illegal means directed against that third party.”

But it is said, and the learned judge has so found, that the defendants were guilty of inducing and intentionally obtaining severally and in combination a direct breach by the employers of the plaintiff's agreement of service and his finding with regard to that matter is expressed in these words: “At the

C. A.
1920
WHITE
v.
RILEY.
Younger L.J

(1) [1898] A. C. 1, 96.

(2) 2 E. & B. 216.

C. A.
1920
WHITE
v.
RILEY.
Younger L.J.

time when this last decision was arrived at"—that I think was on December 5—"by the defendants and the rest of the shop they knew that no notice to terminate the plaintiff's engagement had been given, and that to discharge him on that day would amount to a breach of contract. They further knew and intended that this would and should be the result of their last intimation or threat to their employers, who had previously stated that they could not face a strike in connection with the dispute as to which union the plaintiff should belong. The 'shop' including the defendants further agreed on December 5 to indemnify the employers for discharging the plaintiff without notice."

Now that statement of the learned judge imports undoubtedly that the view which he took of the evidence was that the arrangement made between the men through the defendant Riley and the employers on December 5 was that the plaintiff's services should be dispensed with without notice and without payment and that the employers would be indemnified by the men in respect of any consequences which might ensue by reason of the non-payment or want of notice. But when the evidence is looked at—and the Master of the Rolls and the Lord Justice have referred to it—it is, to my mind, quite plain that that was not the arrangement at all. The arrangement on December 5 to which the employers assented was that they would make payment to the plaintiff of the sum to which on all hands it was agreed or supposed he was entitled in lieu of notice, and that payment having been made, an arrangement for deducting it from their own pay, or otherwise, was to be carried out, so that the employers would not be out of pocket in respect of it, while the reason why, notwithstanding that arrangement, the payment was not in fact made was that for some reason or other which does not appear the employers at a later date thought better to withdraw from the arrangement altogether and informed the defendant Riley that they would have nothing to do with the payment to the plaintiff of his money.

The result therefore is that the finding of the learned judge

is not borne out, as it seems to me, by the evidence on either side, and, in my judgment, so far from any breach of contract with the plaintiff having been intended by the defendants their intention was that the contract with the plaintiff should be fulfilled to the full and at their own expense. It seems to me, therefore, impossible to hold that the defendants knowingly procured the commission of an illegal act in this respect, and therefore they are not within the only other ground on which, according to Lord Watson, it would be possible to make them liable—namely, that they knowingly and for their own ends induced the commission of an actionable wrong.

In the view which I take of the facts of the case the question with regard to the Trade Disputes Act, 1906, does not arise, and all I would wish to say with regard to that Act is, that I concur entirely in the view which has been expressed by the Master of the Rolls and Warrington L.J. with reference to its provisions.

Appeal allowed.

Solicitors for appellants : *Stooke-Vaughan, Taylor & White.*

Solicitors for respondent : *Gibson & Weldon, for Randle J. Evans, Wolverhampton.*

W. I. C.

C. A.
1920
WHITE
v.
RILEY.
Younger L.J.

Applied. Re HARVEY (dec'd.). [1950]
1 All E.R. 491.

C. A.

In re DILKE.

1920

PETERSON

In re DILKE'S SETTLEMENT TRUSTS.

J.

April 29, 30.

VEREY *v.* DILKE.

C. A.

[1919. D. 1432.]

1920

Oct. 13.

*General Power of Appointment—Exercisable by Deed with Consent of Trustees—
Donee Person of unsound Mind—Exercise by Deed with Consent of Trustees
in Favour of such Persons as Donee should by Will or Codicil appoint—
Appointment by Donee's Codicil—Construction—Valid Exercise.*

Under a settlement, a general power of appointment over the settlement funds was, in the events which happened, conferred upon C. D., the tenant for life, who at the date of the settlement was a person of unsound mind not so found by inquisition. The power was to be exercised with the consent and concurrence of the settlement trustees (not being less than three) or of a majority of three of four trustees.

C. D. having recovered and being no longer subject to lunacy jurisdiction, subsequently, in April, 1918, by deed made between himself of the one part and three of the four settlement trustees of the other part, with the consent and concurrence of the three trustees parties thereto testified by their execution of those presents, appointed that the settlement trustees should after his death stand possessed of the trust funds in trust for such person or persons and purposes as he should by will or codicil appoint. By a subsequent codicil referring to the power contained in the deed of April, 1918, C. D. appointed that the settlement trustees should pay and transfer the settlement funds as therein mentioned :—

Held by the Court of Appeal (affirming the decision of Peterson J.) that, on the true construction of the power, the trustees were not required to approve of the persons who were to benefit under the exercise of the power or of the extent to which they were to benefit, but that the exercise of the power was merely made conditional upon the consent and concurrence therein of the trustees; and that the deed of April, 1918, was a valid exercise of the power.

ADJOURNED SUMMONS.

By an Indenture of Settlement dated December 1, 1914, and made in pursuance of a compromise in an action approved by the Chancery Division and the Master in Lunacy, and to which settlement Sir Charles Wentworth Dilke, a person of unsound mind not so found by inquisition, by the receiver of his estate, was a party, a sum of 48,000*l.* was vested in trustees upon trust to pay the income thereof during

the life of Sir C. W. Dilke (hereinafter called the testator), as therein mentioned and after his death, subject to certain trusts which failed, "in trust for such person or persons as the" testator "with the consent and concurrence in the deed of the said trustees or trustee (not being less than three) or of a majority of three of four trustees shall by deed personally appoint and in default of and so far as any such appointment shall not extend or operate then as to the sum of 15,000*l.* and the estate duty thereon as the" testator "shall by any existing or future will appoint."

C. A.
1920
DILKE,
In re.
DILKE'S
SETTLEMENT
TRUSTS,
In re.
VEREY
v.
DILKE.

By an Indenture dated April 19, 1918, and made between the testator, who had by this time recovered and was no longer subject to lunacy jurisdiction, of the one part and three out of the four settlement trustees of the other part, after reciting (*inter alia*) the power in the settlement and that the testator was desirous of making such appointment as was thereafter contained with the consent and concurrence of the trustees parties thereto testified by their execution of those presents and that the fourth trustee of the settlement had not signified his assent or dissent to that appointment, the testator with the consent and concurrence of the trustees parties thereto, being three out of the four trustees of the settlement, testified as aforesaid, thereby appointed that the settlement trustees should after the death of the testator stand possessed of the settlement trust funds in trust for "such person or persons and purposes" as the testator should by will or codicil appoint.

By a codicil dated May 6, 1918, to his will, the testator after referring to the last-mentioned deed and the power thereby conferred appointed that the settlement trustees should pay and transfer one-third part of the settlement trust funds for the benefit of his wife absolutely, and subject thereto the testator disposed of the remaining two-thirds of the same funds in manner therein mentioned.

The testator died on December 7, 1918, and his executors took out this summons for the determination (*inter alia*) of the question whether the testator was entitled on April 19, 1918, to exercise the power given to him by the

C. A. 1920 <u>DILKE,</u> <i>In re.</i> DILKE'S SETTLEMENT TRUSTS, <i>In re.</i> VEREY <i>v.</i> DILKE. 	settlement, and, if so, whether the power had been well and effectually exercised by him by the deed of that date. <i>G. R. Northcote</i> for the plaintiffs. <i>Dighton Pollock</i> for the testator's widow. <i>Droop and J. T. Prior</i> for other defendants interested under the testator's codicil. <i>Hughes K.C. and Vaisey, and Knowles Corrie</i> for defendants entitled in default of appointment. <i>Bryan Farrer</i> for the settlement trustees.
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PETERSON J. stated the material facts and provisions of the deeds and codicil and continued: The question is whether the appointment in purported exercise of the power of appointment conferred by the original deed of compromise is valid or not. The question is really a question of construction and may be put in this way: Does the consent which is referred to in the power of appointment mean that the trustees have to consider and approve the actual person in favour of whom it is proposed that the power of appointment shall be exercised or does the consent relate, not to the selection of the individuals to be benefited but to the exercise of the power? It has been pointed out, and the deed itself shows, that Sir Charles at the date of the original deed was not of sound mind, and it has been argued that the real intention of the provision was that the question whether Sir Charles was competent to exercise the power of appointment should be considered by the trustees, and that their consent to the execution of the deed, testified by their concurrence in the deed, should be obtained before it could be contended that the power had been exercised. Some preliminary observations may be made with a view to throwing some light, as I think, on the proper construction of this clause. If the words relating to the consent of the trustees be omitted, there can be no doubt that the power would be a simple general power of appointment. A general power of appointment would undoubtedly authorize him to appoint by deed for such purposes as he should appoint

by will; in other words, the general power, standing by itself, would undoubtedly have authorized what in fact was done: it would have authorized also an appointment by Sir Charles to himself. The general power would also have enabled him to have appointed for such purposes as another person should appoint. Having regard to the fact that without the words relating to the trustees' consent there would be a simple general power of appointment which would enable that to be done which has been done, does the introduction of the words alter what would otherwise be a general power of appointment so as to restrict it in such a way as to prevent the appointor from doing that which he otherwise would have been entitled to do under the general power of appointment, or is the more reasonable interpretation that the consent and concurrence in the deed of the trustees is a consent to the exercise of the general power, manifested by the concurrence of the trustees in the deed of appointment?

On the whole, I am of opinion that, on the true construction of this clause the trustees are not required to approve of the persons who are to benefit under the exercise of the power of appointment or of the extent to which they are to benefit, but that the exercise of the general power is conditional upon their consent. In my view the true meaning of the clause is that the trustees are to stand possessed of the trust funds in trust for such person or persons as Sir Charles should by deed appoint, such appointment to be made with the consent and concurrence of the trustee or trustees. I am therefore of opinion that the power has been properly exercised.

R. M.

One of the defendants entitled in default of appointment appealed. The appeal was heard on October 13, 1920.

C. A.

Hughes K.C. and *Knowles Corrie* for the appellant. This is not such a general power of appointment as would enable the donee to exercise it in his own favour. The provisions of the deed of December 1, 1914, are in the nature of a

C. A.

1920

DILKE,
*In re.*DILKE'S
SETTLEMENT
TRUSTS,
In re.

VEREY

v.

DILKE.

Peterson, J.

C. A.
1920
DILKE,
In re.
DILKE'S
SETTLEMENT
TRUSTS,
In re.
VEREY
v.
DILKE.
—

compromise and give certain powers to the testator and subject thereto the property is given to other persons. The trust is not in the ordinary form creating a general power of appointment but is very strictly framed. It is submitted that the testator is not a "person" within the meaning of the power to whom an appointment can be made. The fact that under the deed he is given an express power to appoint by will 15,000*l.* shows that it was not intended that he should have power to appoint the rest of the fund by will. The omission from the power of the words "for such purposes," which are usual in a general power, is significant. It is submitted that an appointment by the testator to his executors would not have been a valid exercise of the power. The words "such person or persons" mean such person or persons, other than the testator himself, as the trustees should approve. The persons appointed must be capable of being ascertained at the date of the appointment. Here it is left to the testator to appoint by will. A power is not a general power if the consent of the trustees to the objects of the appointment is required, because it is limited by that consent. This is in effect a limited power, that is, it is limited by the requirement of the approval of the trustees to the persons to be appointed. There is a positive duty imposed on the trustees to exercise a discretion in seeing that the testator appoints to such persons as they approve of. Except to the extent to which the trustees may approve the funds are kept for the benefit of the persons ultimately entitled.

Vaisey for other defendants entitled in default of appointment.

Luxmoore K.C. and *Dighton Pollock* for the testator's widow. The construction put upon the clause by Peterson J. was right. It is submitted that the power is a general power subject to the question of consent. There can be no question that a general power of appointment may be exercised by the donee in his own favour or in that of his executors. The only question in this case is whether the testator could appoint to himself. There is nothing in

the deed of December 1, 1914, which says that the words "person or persons" shall exclude the donee. All that the trustees have to do is to concur in the power being exercised. The trustees could have given him power to appoint by deed. It was not intended by the clause to give the trustees a power of appointment. It does not provide that the donee is to appoint to such persons as the trustees shall approve. The trustees could have consented to an immediate appointment by the donee to himself although the interest he would have taken would have been reversionary.

[WARRINGTON L.J. The point really is, is this a general power or not?]

It is submitted that the construction of the power is that put upon it by Peterson J.

Clauson K.C. and *Droop* for an infant defendant entitled under the codicil. We adopt the same argument. The infant respondent is entitled under the codicil. There is no ground for saying that the words "person or persons" do not include the donee.

J. T. Prior for another infant defendant entitled in the same interest.

Bryan Farrer for the settlement trustees.

G. R. Northcote for the executors of the testator's will.

Knowles Corrie in reply. It is submitted that the effect of the clause is that the trustees were to have a veto on the way in which the testator dealt with the property. The appointment made is not in accordance with the power given by the deed of December 1, 1914. The books of precedents show that in conferring general powers of appointment words referring to purposes or trusts are invariably inserted and no instance appears in the modern books of a power to appoint to persons only. In this case the unusual form shows that it was to the persons that the trustees' consent was to be given.

LORD STERNDALÉ M.R. (after stating the facts). The question is whether the appointment made by the deed of

C. A.

1920

DILKE,
In re.DILKE'S
SETTLEMENT
TRUSTS,
In re.VEREY
v.
DILKE.
—

C. A. April 19, 1918, was a good exercise of the power given to the
 1920 testator by the deed of December 1, 1914. That depends
 upon the meaning, as it seems to me, of the words "in trust
 for such person or persons as the" testator "with the
 consent and concurrence in the deed of the present trustees
 shall by deed appoint" in the deed of 1914. Apart from
 those words I have no doubt that Peterson J. was quite
 right in saying that this was an ordinary general power
 of appointment.

DILKE,
In re.
 DILKE'S
 SETTLEMENT
 TRUSTS,
In re.
 VEREY
v.
 DILKE.
 Lord Sterndale
 M.R.

Some stress was laid on the absence from the clause of the words "and purposes" after the words "such person or persons." I do not attach any importance to that fact. They may or may not be contained in other precedents of the form of a general appointment. It seems to me that the words "such person or persons" might have been omitted. It would have made no difference if the words had been "as he shall appoint" without those other words. It would still be a general power of appointment, and I have no doubt that this was, but for the words I have already read, a general power of appointment under which what was done would be perfectly properly done. I think that the question as to the effect of the words cannot be better stated than it was stated by Peterson J. in his judgment. He says this: "Having regard to the fact that without the words relating to the trustees' consent there would be a simple general power of appointment which would enable that to be done which has been done, does the introduction of the words alter what would otherwise be a general power of appointment so as to restrict it in such a way as to prevent the appointor from doing that which he otherwise would have been entitled to do under the general power of appointment, or is the more reasonable interpretation that the consent and concurrence in the deed of the trustees is a consent to the exercise of the general power manifested by the concurrence of the trustees in the deed of appointment?" The argument on the part of the appellant as to the meaning of the words "with the consent and concurrence" and so on of the trustees may, I think, be put in this way: first,

that the person or persons to whom the consent and concurrence of the trustees are required must exclude the testator himself, and secondly that their consent and concurrence must be to the persons who are to be appointed. The trustees must know the persons who are to be appointed, if not by name then by description, they must consent to the appointment of those particular persons, and they have no power to consent to the appointment of persons to take under this appointment who were not known to them at the time when they gave their consent. That is to say, the consent must be a consent to the persons who are to benefit under the appointment, and a consent to the exercise of the power of appointment is not sufficient. That I think was the entire drift of the argument on the part of the appellant. Having read the question as stated by Peterson J. in his judgment, I cannot do better than read his answer to it. He says: "On the whole, I am of opinion that on the true construction of this clause the trustees were not required to approve of the persons who are to benefit under the exercise of the power of appointment or of the extent to which they are to benefit, but that the exercise of the general power is conditional upon their consent. In my view the true meaning of the clause is that it is equivalent to a declaration that the trustees are to stand possessed of the trust funds in trust for such person or persons as the testator shall by deed appoint, such appointment to be made with the consent and concurrence of the trustee or trustees." I agree with the way in which the question has been stated by Peterson J. and with his answer to it. In my opinion the appeal should be dismissed.

C. A.
1920
DILKE,
In re.
DILKE'S
SETTLEMENT
TRUSTS,
In re.
VEREY
v.
DILKE.
Lord Sterndale
M.R.

WARRINGTON L.J. I am of the same opinion. The question we have to determine is whether the power which has been exercised by the deed of April 19, 1918, is a general or a special power. The two kinds of powers have been thus defined (1): "General powers are such as the donee can exercise in favour of such person or persons as he pleases,

(1) Farwell on Powers, 3rd ed., p. 8.

C. A. including himself. Limited powers, which are sometimes also
 1920 called special powers, are such as the donee can exercise
 DILKE, only in favour of certain specified persons or classes.”
In re. Now on the one hand it is said that this is a power which
 DILKE'S SETTLEMENT can be exercised by the testator in favour of such person or
 TRUSTS, persons as he pleases although for the validity of its exercise
In re. the consent of the trustees and their concurrence in the
 VEREY deed are required. On the other hand it is said that it is
 v. a special power exercisable only in favour of such persons
 DILKE. or classes of persons as shall be approved by the trustees
 Warrington L.J. and ascertained or ascertainable by name or description
 at the date of the exercise of the power. Which of those
 two constructions is the right one? The words are “in
 trust for such person or persons as the” testator “with
 the consent and concurrence in the deed of the said trustees
 or trustee (not being less than three) or a majority of three
 of four trustees shall by deed personally appoint.” Omitting
 for the moment the words “with the consent and con-
 currence” and so on, the power is clearly a general power.
 The trust is for such persons as the testator shall personally
 appoint. There can be no question as to that; but the
 words “with the consent and concurrence” are inserted.
 In my opinion the natural meaning of those words is that
 the consent of the trustees to the exercise of the power and
 their concurrence in the deed are required to the appointment.
 The trust is for such persons and so on as with their consent
 the testator shall appoint. It is to the appointment that the
 consent is required. In other words the consent is required
 in order to give validity and effect to the appointment, but
 the appointment is to be made by testator himself, and
 it is to him and to him alone that the selection of the
 objects of the power is left; but when he has selected
 those objects effect can only be given to the appointment
 by his obtaining the consent of the trustees and their
 concurrence in the deed. I think I am only stating in
 my own words the view expressed by Peterson J., with
 which I entirely concur. I agree that the appeal must be
 dismissed.

YOUNGER L.J. I am of the same opinion, and I cannot help suspecting that the difficulty which has arisen in the case respecting the validity of the appointment of April 19, 1918, is in some sense attributable to the circumstance that under the appointment the fund has in fact been appointed by the testator in trust for such person and persons and purposes as he shall by will or codicil appoint, whereas if you look at the deed of December 1, 1914, you find that—not in exercise of any such power but—in default of the exercise of such power of appointment, the fund is not as to the whole but only as to the sum of 15,000*l.* and the estate duty thereon to go as the testator shall by any existing or future will appoint. Accordingly if the appointment be good the effect is that the whole of the fund thereafter is disposable by the testator by his will, whereas according to the terms of the deed of trust it would appear that he is only to be entitled so to dispose of 15,000*l.* of it, and then only if there has been no such appointment made at all as is previously authorized. In other words, I think if the appointment had not actually taken the form which it did the arguments against it would not have been so plausible as they have been. But one has to take the deed apart from these considerations and say what it authorized, and I cannot come to any other conclusion than that in point of fact there is in the event given to the testator a general power of appointment by deed, and that the extent to which that appointment may go is not limited by the fact that it is not valid unless three out of four or all the four trustees must consent to its being made. Nor again am I able to arrive at the conclusion that you ought in any way to limit the effect of the words “for such person or persons as the” testator “shall appoint.” The general power given by the trust deed in default of appointment, which is expressed to be as to the sum of 15,000*l.* as the testator shall by any existing or future will appoint, is different from the words immediately preceding, but not, it seems to me, so different as to enable the Court to place on those words any limited significance. Accordingly there was here a general power

C. A.

1920

DILKE,

*In re.*DILKE'S
SETTLEMENT
TRUSTS,
In re.

VEREY

v.

DILKE.

C. A. of appointment to be exercised with certain consent ; that
 1920 power has been exercised and the consent forthcoming ;
DILKE, the power has therefore been well and effectually exercised.
In re.

DILKE'S Appeal dismissed.
 SETTLEMENT

TRUSTS,
In re. Solicitors : *Russell-Cooke & Co. ; Preston & Foster ;*
 VEREY *Beaumont, Son & Rigden ; Lewis & Lewis ; Farrer & Co. ;*
v.
DILKE. *Lethbridge, Money & Prior ; Stow, Preston & Lyttelton.*

W. I. C.

C. A.

In re WILLIS.

1920

SHAW *v.* WILLIS.

Oct. 15, 20.

[1920. W. 457.]

Will—Charity—General charitable Intention—Gift to Charity to be selected by W. within specified Period—Death of W. before Testatrix—Discretion and its Exercise, whether of Essence of Gift.

A testatrix, after appointing an executor and trustee, gave her personal estate in England subject to payment of her testamentary expenses and debts and a legacy to her sister for life. She then directed that on the death of her sister certain legacies should be raised and paid, and subject thereto gave the rest and residue of her personal estate in England, "to such charitable institution or society in England Russia or elsewhere as may be selected by my friend" W. "within three calendar months from the time of the decease of my sister." Both the sister and W. predeceased the testatrix :—

Held, that the testatrix had by her residuary gift shown a general charitable intention, notwithstanding the discretion conferred by her on W. and the limit of time imposed for its exercise, and further, that the charitable intention was not affected by the fact that W. was neither a trustee nor an executor.

Held therefore that the gift of residue in favour of charity was valid.

Principles laid down by Lord Eldon in *Moggridge v. Thackwell* (1803) 7 Ves. 36 and *Mills v. Farmer* (1815) 1 Mer. 55 applied.

Decision of Astbury J. [1920] 2 Ch. 358 reversed.

APPEAL from a decision of Astbury J. (1)

By her will dated June 9, 1898, Mary Willis, after

(1) [1920] 2 Ch. 358.

appointing an executor and trustee, gave and bequeathed unto her trustee all her personal estate and effects in England upon trust to pay her funeral and testamentary expenses and debts and a legacy of 100*l.* and in the next place to sell, call in and convert into money the residue of her personal estate and effects in England and invest the same as therein mentioned and to stand possessed of the proceeds upon trust to pay the income and annual dividends and produce thereof to her sister, Anne Willis, during her life, and after her decease upon trust to raise and pay certain pecuniary legacies including a legacy of 500*l.* to her friend Mary Whitehead; and then as to all the rest and residue of the said personal estate and effects in England she gave and bequeathed the same "to such charitable institution or society in England Russia or elsewhere as may be selected by my friend the said Mary Whitehead within three calendar months from the time of the decease of my sister the said Anne Willis." The testatrix also made a codicil to her will dated July 13, 1915, by which after giving two pecuniary legacies she ratified and confirmed her said will in every other respect.

The testatrix, who was a British subject residing formerly at Petrograd in Russia and afterwards at San Remo in Italy, died on September 23, 1917. Both Anne Willis and Mary Whitehead predeceased the testatrix. The executor named in the will renounced probate and administration with the will and codicil annexed was taken out by the plaintiff on January 16, 1920.

On February 23, 1920, this summons was taken out raising the question whether the bequest of residue had failed or whether by the application of the doctrine of *cy pres* or otherwise the bequest was still valid and subsisting and could be carried into effect.

Astbury J. held that the testatrix had not by her residuary gift shown a paramount general charitable intention that the discretion conferred on Mary Whitehead and its exercise were of the essence of the gift, and accordingly that the gift of residue failed and the residue went as on an intestacy.

C. A.
1920
WILLIS,
In re.
SHAW
v.
WILLIS.

C. A.
1920

WILLIS,
In rs.
SHAW
v.
WILLIS.

The Attorney-General appealed. The appeal was heard on October 15, 20, 1920.

Austen-Cartmell and *H. O. Danckwerts* for the Attorney-General.

Micklem K.C. and *Donald Cohen* for the next of kin.
Rudall for the plaintiff.

The arguments, which were substantially the same as those used in the Court below, are fully stated in the judgments of the Court of Appeal.

The following additional cases were referred to : *Salisbury v. Denton* (1) ; *Anon.* (2) ; *Attorney-General v. Syderfen.* (3)

LORD STERNDALE M.R. This is an appeal from *Astbury J.* raising a question as to the meaning of a bequest in the will of *Mary Willis*. [His Lordship read the terms of the bequest and continued :] Both *Anne Willis* and *Mary Whitehead* died in the lifetime of the testatrix, and therefore the selection by *Mary Whitehead* within three months of the death of *Anne Willis* became impossible. The question is whether the gift in consequence fails or whether it remains a good charitable gift, the exact carrying out of which according to the terms of the will has become impossible but which must be carried out by a scheme or by the Sovereign under the sign manual. Of course there is no question that if this bequest had been for the benefit of certain individuals, say, for such of her nephews and nieces as *Mary Whitehead* shall select, the gift would have failed.

It was long ago decided that the same principle does not apply in the case of charitable gifts. In *Mills v. Farmer* (4) Lord Eldon said : "There is no question, that the Court has not the power to make a will for the testator, but only to carry into execution that which he has made himself ; and this it can do only by giving to it such a construction as former precedents have established to be the right construction in every particular instance. Neither is there any

(1) (1857) 3 K. & J. 529.

(2) (1702) Freem. Ch. 262.

(3) (1683) 1 Vern. 224.

(4) 1 Mer. 55, 94.

doubt that the same words in a will, when applied to the case of individuals, may require a very different rule of construction from that which would govern them if applied to the case of charity. If I give my property to such person as I shall hereafter name to be my executor, and afterwards appoint no executor; or if, having appointed an executor, he dies in my lifetime and I appoint no other to supply his place, in either of these cases, as to individuals, the testator must be held intestate, and his next of kin will take the estate. But, to give effect to a bequest in favour of charity, the Court will, in both instances, supply the place of an executor and carry into effect that which, in the case of individuals, must have failed altogether. This distinction has proceeded partly, perhaps, on principles in the Roman law which we do not at this time perfectly comprehend; and partly, no doubt, on the religious notions which formerly obtained in this country, according to which it fell to the ordinary's province to distribute, in case of intestacy. A third principle, which it is now too late to call in question, is, that in all cases in which the testator has expressed an intention to give to charitable purposes, if that intention is declared absolutely, and nothing is left uncertain but the mode in which it is to be carried into effect, the intention will be carried into execution by this Court, which will then supply the mode which alone was left deficient." The question is whether this gift falls within the principles there laid down. Of course if the matter were *res integra* it might require a great deal of consideration whether there should be any difference in the principle applied to charitable gifts and to gifts to individuals, because the person who is left to select the charitable institution may have been appointed because the testator or testatrix had confidence in his opinion and perhaps knew that his opinion was the same as his or her own. It might very well have been argued, I think, that in that case where a certain individual is to select the objects of charity, if that person is unable to or does not do so, the gift is intended to fail; but that to my mind as a general proposition is entirely disposed of by a

C. A.

1920

WILLIS,
In re.

SHAW

v.

WILLIS.

Lord Sterndale
M.R.

C. A.
1920
WILLIS,
In re.
SHAW
v.
WILLIS.
Lord Sterndale
M.R.

great number of cases extending over a long period of years. It was especially dealt with in *Mills v. Farmer* (1) to which I have just referred where Lord Eldon says : “ *Moggridge v. Thackwell* (2) was determined entirely by the force of precedents, much against my inclination ; inasmuch as the appointment of an individual, in whom alone the testatrix thought proper to repose the confidence which she reposed in Vaston, indicated an intention of that peculiar nature which it is impossible to suppose could be in any degree rendered effectual by the Court taking upon itself the administration of a trust, certainly meant to be personally vested in the individual selected. Nevertheless, in that case, I took it to be firmly established, upon the authority of precedents too numerous to be mentioned, that, although in carrying into execution a bequest to an individual, the mode in which the legacy is to take effect must be of the substance of the legacy, yet, where the testator has sufficiently denoted that charity is his legatee, the Court will consider charity as the whole substance of the legacy ; and, in such cases only, will provide a mode by which that legatee shall take, but by which no other than charitable legatees can take.”

Moggridge v. Thackwell (2) was a case in which there was a bequest in these terms : “ I give all the rest and residue of my personal estate unto James Vaston, of Clapton, Middlesex, gentleman, his executors and administrators ; desiring him to dispose of the same in such charities as he shall think fit, recommending poor clergymen who have large families, and good characters ; and I appoint the said John Moggridge and Mr. Vaston, before mentioned, executors of this my will ; and I desire Robert Woodford, of Taplow, Bucks, Esquire, and the aforesaid Mr. Richard Wicherley, to aid and assist my executors.” Vaston died in the lifetime of the testator, but it was held that the gift did not fail and must be carried out by a scheme in the Court of Chancery. But for two matters that case would be directly in point. One matter is that Vaston was a trustee and Mary Whitehead is not a trustee or an executor, and therefore does not take the

(1) 1 Mer. 55, 99.

(2) 7 Ves. 36, 38.

property. I cannot myself see that that makes any difference. Lord Eldon's third principle, as he calls it, is that in all cases where a testator has expressed an intention to give to charitable purposes, if that intention is declared absolutely and nothing is left uncertain but the mode in which it is to be carried into effect, the intention will be carried into execution by this Court. The mode is left uncertain, just as much and just as little, in the case where the person who has to exercise the selection is a trustee as in the case where he is not.

C. A.
1920
WILLIS,
In re.
SHAW
v.
WILLIS.
Lord Sterndale
M.R.

In *In re Douglas* (1) Cotton L.J. says, no doubt as a dictum, but a dictum of Cotton L.J. is one of great weight : "Take a gift to A., B., C., or any number of individuals or institutions in such proportions as a trustee or any one else shall name and appoint; if the person designated does not exercise the discretion and power given, then the Court will execute the trust. It will do so, where the objects are definite, by deciding, unless there is something in the will to show a contrary intention, that the fund which is the subject of the trust shall be divided equally amongst all the objects of the testator's bounty."

In the old case of *Attorney-General v. Syderfen* (2) approved by Lord Eldon in *Moggridge v. Thackwell* (3) the case was put of the selection being reserved to the testator himself and not exercised by him, and it was there said : "And so it was held in the case of Mr. Syderfin's will and the case of one Jones; but if the will points to any particular charity, as for maintenance of a school-master or poor widows, then the Court of Chancery ought not to direct it to any other purpose but such as is pointed out by the will," and later on : "As if a devise should be for such school as he should appoint, and appoints none, the Court may apply it for what school they please." That is to say, the Court will make the selection which the testator intended to have made himself, because that is only a mode of carrying out the deed, but it will confine itself in making that selection to the class of

(1) (1887) 35 Ch. D. 472, 485.

(2) 1 Vern. 224.

(3) 7 Ves. 36, 70, 74.



C. A.
1920
WILLIS,
In re.
SHAW
v.
WILLIS.
—
Lord Sterndale
M.R.

charity which the testator has mentioned in his will. I can see no difference in principle between a selection being entrusted to some person not a trustee or executor and a selection being entrusted to a trustee or executor. No doubt it may be argued that in the case of the trustee there is no question whether he can keep the property for himself or apply it to the object of the trust, as the object of the trust must be carried out. In the same way it seems to me that there is a trust created of the fund in the hands of the executor or trustee although that executor or trustee may not be the person who has to select the objects. There is a trust of the fund in the hands of that executor or trustee for the application of the fund in the manner which a person who is named in the will shall select.

The other matter, and the only other matter which really, I think, raises a suggestion of a tangible distinction between the cases is that there is a limitation of time placed on Mary Whitehead's selection. She must make it within three months after the death of Anne Willis, the tenant for life. Mary Whitehead died two years before the testatrix, and therefore, if any importance is to be attached to the knowledge of the testatrix in *Moggridge v. Thackwell* (1) of the death of Vaston in her lifetime, I think it should fairly be assumed that the death of Mary Whitehead was known to the testatrix. They were friends. Mary Whitehead died in England and the testatrix died at San Remo. I should think it may fairly be assumed that in those two years the testatrix would have heard of the death of Mary Whitehead. I do not myself think that the knowledge or ignorance of the testatrix of her death is of any importance, but if it be, I think we ought to assume her knowledge. What is said is this: Mary Whitehead was a person over whom the Court had no jurisdiction. She was mentioned as a person who must within three months from the death of the tenant for life exercise this power of selection. That being so, it must be taken that the testatrix meant that the gift should not take effect at all unless Mary Whitehead exercised that power

(1) 7 Ves. 36.

within three months. The case was put of Mary Whitehead not having exercised the power within three months from the death of the tenant for life, but of having survived the testatrix and continued to live, if you like, up to the present time. It was said that in that case it would seem contrary to the intention of the testatrix that in the lifetime of Mary Whitehead, who might wish to exercise the power after the expiration of three months, it should be taken out of her hands and entrusted to the Court. I feel the force of that contention, but I do not myself feel it makes a distinction between this case and the decided cases. It does not seem to me that there is any difference in principle between that case and a case where there is no time limit, but after the death of the testatrix the person appointed to select refuses to select and still continues to live. It does not seem to me that that circumstance shows that the gift was not a gift for general charitable purposes when only the mode of application of it is left uncertain. When one looks at the words of the gift again, it seems to me impossible to distinguish this case and to say that there is not a general intention to give to charity with merely the mode of application left uncertain. Therefore whatever I might have thought in the absence of authority—and I confess to some sympathy with the view taken by Astbury J.—in my opinion this case cannot be distinguished from the cases which have been cited to us. I think that this appeal must be allowed, and that this gift must be held to be a good charitable gift.

WARRINGTON L.J. I am of the same opinion, and except for the fact that Astbury J. had expressed a view different from that which I am about to express, I should have had no doubt whatever about the way in which this case ought to be decided. The gift in question is a gift of the residue of the testatrix's estate "to such charitable institution or society in England Russia or elsewhere as may be selected by my friend the said Mary Whitehead within three calendar months from the time of the decease of my sister the said Anne Willis."

C. A.
1920
WILLIS,
In re.
SHAW
v.
WILLIS.
Lord Sterndale
M.R.

C. A.
 1920
 WILLIS,
In re.
 SHAW
v.
 WILLIS.
 Warrington L.J.

It has been established by numerous authorities that there is a special principle guiding the Court in reference to legacies to charities different from that which guides it in reference to legacies to individuals or to purposes which are not charitable. That principle is this. If the Court sees a general intention in favour of charity but a particular mode indicated for giving effect to that intention cannot be adopted, that will not affect the validity of the gift, but the Court will in some form or other give effect to it. One of the most familiar instances is where the particular mode indicated by the testator is the selection of the particular charitable objects. It has over and over again been decided that the impossibility of the selection being made as directed by the testator will not prevent the Court from giving effect to the charitable bequest by making the selection itself. The principle is thus stated in general terms in Tudor's *Charitable Trusts*, 3rd ed., p. 32: "Where a bequest is made for certain definite objects and for charitable purposes, in proportions to be fixed by trustees or other persons, the gift for charitable purposes will not fail, although the persons entrusted with the apportionment die without apportioning." That is one mode of stating the principle. It has arisen in many cases which I am not going through in detail. Sometimes, as in *Syderfen's Case* (1), the testator has reserved to himself the power of making the selection by giving the property to such charitable purposes as he shall by a paper left at his death direct. In other cases the testator has reserved to himself the selection by saying it shall be to such charitable purposes as he shall by codicil direct. In all those cases, although the testator has not left a paper, and although he has not left a codicil, effect has been given to the intention in favour of charity, and the selection has been made by the Court, or sometimes under the direction of the Court by the King by sign manual. In one way or another the charitable intention has had effect given to it. The two cases in which the principle has been most discussed are *Moggridge v. Thackwell* (2) and *Mills v. Farmer*. (3) In

(1) 1 Vern. 224.

(2) 7 Ves. 36.

(3) 1 Mer. 55.

Moggridge v. Thackwell (1) the selection was to be made by a man named Vaston, who was the residuary legatee, that is to say, he was the legatee of the residue which was given to charity, and he was also one of the executors. He died before the testator, and therefore he could not select. Notwithstanding that, effect was given to the bequest to charity. The Court directed a scheme. In *Mills v. Farmer* (2) there is an elaborate judgment of Lord Eldon, again of none the less force because he felt himself constrained by the authorities to give judgment as he did. In that case he met some of the suggested points of distinction which have been raised in the present case, and in particular the suggestion that there may be a distinction where the person appointed to select is a trustee of the property devoted to charity, and where he is not a trustee. Lord Eldon disposes of that suggestion at p. 96 of the report in 1 Merivale. Again in more modern times the principle is stated by Cotton L.J. in *In re Douglas* (3) in the passage which has been read by the Master of the Rolls. It was also stated by Sargant J. in *In re Eades* (4) where the gift was to "such religious, charitable and philanthropic objects" as three named persons should jointly appoint. Nevertheless, but for the fact that the gift was not to charity, Sargant J. held that the principle to which I have alluded would have been acted upon. Of course the principle only applies where there is a general charitable intention. What is here said by Mr. Micklem is the view adopted by Astbury J., that there is no general charitable intention, and that the selection by Mary Whitehead is of the essence not only of the mode of applying the charitable intention but of the gift itself. There, with all respect, I join issue with the view expressed by Astbury J. It seems to me that there is a clear gift to some charitable institution and that gift is not affected by the direction as to the selection. What is left open is the nomination of the particular institution which is to take. That is the very case in which, in the authorities which have been so much

C. A.
1920
WILLIS,
In re.
SHAW
v.
WILLIS.
Warrington L.J.

(1) 7 Ves. 36.

(2) 1 Mer. 55.

(3) 35 Ch. D. 472, 485.

(4) [1920] 2 Ch. 353.

C. A. discussed in this Court, the principle to which I have alluded
1920 is resorted to. The fact that the gift is to some charitable
WILLIS, institution excludes any other purpose whatever. It is to
In re. some charitable institution, but the particular charitable
SHAW institution is to be selected in a particular way, and that
v. way fails. The gift to some charitable institution, in my
WILLIS. opinion, stands in effect, and the Court determines—I will
Warrington L.J. not say “to which,” because “which” involves an alter-
native—to what out of all the charitable institutions and
societies in the world this money should be paid.

In my judgment the decision of Astbury J. is incorrect
and must be reversed.

YOUNGER L.J. The problem which in this case we have
to solve is to say by which of two different principles the
construction of this gift has to be controlled. The first of
these principles is that if a testator has manifested a
general intention to give to charity, whether in general terms
or to charities of a defined character or quality, the failure
of the particular mode in which the charitable intention is
to be effectuated shall not imperil the charitable gift. If the
substantial intention is charitable the Court will substitute
some other mode of carrying it into effect. The other prin-
ciple which I paraphrase from the judgment of Kay J. in
Biscoe v. Jackson (1) is this. If on the proper construction
of the will the mode of application is such an essential part
of the gift that you cannot distinguish any general purpose of
charity but are obliged to say that the prescribed mode of
doing the charitable act is the only one the testator intended
or at all contemplated, then the Court cannot, if that mode
fails, apply the money *cy pres*.

Now the problem which we have to solve here is, under which
of these two different principles this gift falls. The authori-
ties that have been referred to by my Lord, and by the Lord
Justice, quite clearly show that charity within the meaning
of the first principle has been found by the Courts to be of
the substance and reason of the bequest only by disregarding

(1) (1887) 35 Ch. D. 460, 463.

what would, as applied to any other subject-matter, be the plain meaning of the English words employed. Therefore it is not of itself a sufficient justification for Mr. Micklem's argument that on the plain meaning of her words the testatrix here appears to have indicated that this particular selection must be made by her friend Mary Whitehead, and that it must be made by her within a defined period after the death of the tenant for life constituted under the will or not be made at all. Mr. Micklem next recognizing that, puts with great force this point. Although there are cases in which the death of the person who is to make the selection in the lifetime of the testatrix, or the failure of the testatrix herself to make the selection, if by her will she has stated that that was apparently to be a condition of the gift, does not affect the view of the Court that there exists a general charitable intention, no case can be found in which such a general charitable intention has been attributed to a testator where, first, the person who has to make the selection is not a trustee, and secondly, where that person has to make the selection within a defined period. Mr. Micklem said, and said with great force, that the distinction was of the essence of the matter, because if the person who had to make the selection within a defined period was a trustee, and he failed to make it, the Court executing the trust would be entitled to execute it nunc pro tunc, and therefore so far as the prescribed period was concerned the selection by the Court of the objects to take would be notionally and technically within the terms of the testator's will. On the other hand, where, as here, you find that the person to make the selection is not a trustee and is under no obligation to make it, then if the Court in that event takes upon itself the selection it will not be in a position even technically to make it within the period prescribed by the testatrix. Accordingly he says: Here you are confronted with a prescribed method of division clearly, as Kay J. said, of the essence of the case when it is not possible in the events which have happened for the Court or for any one to comply even notionally with a material condition imposed by the testatrix. I feel the force of the contention very much

C. A.
1920
WILLIS,
In re.
SHAW
v.
WILLIS.
Younger L.J.

C. A.
1920
WILLIS,
In re.
SHAW
v.
WILLIS.
—
Younger L.J.

indeed, and it is only because I cannot bring myself to see that there is such an essential difference in principle between the violence necessarily done to the words used by the testatrix in this case in order to arrive at the conclusion at which we do and the violence done to the words of testators in the other cases in which the same conclusion has been arrived at that I feel I am not at liberty to give effect to the contention put forward by Mr. Micklem. Accordingly it seems to me that, bound as we are by that long course of authority, we should if we were to fail to follow it in this case be really drawing a distinction where perhaps no real distinction exists. On that ground, although I recognize entirely that the decision is contrary to what in every other connection would appear to be the plain words of the testatrix's will, I nevertheless arrive at the conclusion that there is here within the meaning of the authorities a general charitable intention which can be given effect to by a scheme directed for that purpose.

Appeal allowed.

Solicitor for Attorney-General: *Treasury Solicitor*.

Solicitor for remaining parties: *Francis A. Rudall*.

W. L. C.

ROSSDALE v. DENNY.

[1919. R. 1072.]

C. A.

1920

RUSSELL J.

June 1, 2.

C. A.

1920

Oct. 21.

Vendor and Purchaser—Contract on Correspondence—Construction—Conditional Offer—“Subject to a formal contract”—Acceptance—Specific Performance.

The plaintiff wrote to the defendant's agent, with whom he had been negotiating for the purchase of leasehold property belonging to the defendant, as follows: “I hereby beg to offer 75,000*l.* for the property. . . . I am prepared to pay 7500*l.* deposit on signing of formal contract, completion to take place fourteen days after you are in a position to give vacant possession. This offer is subject to a formal contract to embody such reasonable provisions as my solicitors may approve, and to the lease containing no unusual provisions or covenants.”

On the same day the defendant's agent wrote to the plaintiff: “In reply to your letter of even date, I am instructed to accept on behalf of my client . . . the offer therein contained, and I will communicate with him at once so that he may instruct his solicitors to prepare formal contract.” No formal contract having been executed, the defendant repudiated the agreement.

In an action by the plaintiff for specific performance of the alleged contract:—

Held, that the offer was conditional upon a formal contract being executed and there was no binding contract between the parties.

Decision of Russell J. affirmed.

North v. Percival [1898] 2 Ch. 128 disapproved.

APPEAL by the plaintiff from a decision of Russell J.

The plaintiff sued the defendants as vendors for specific performance of an agreement by which, as he alleged, the defendants agreed to sell to him and he agreed to purchase for the sum of 75,000*l.* certain leasehold premises in London together with certain chattels.

The alleged agreement was contained in two letters each dated August 20, 1919. The question was whether those two letters constituted a binding contract between the parties, or whether the offer which was made by the plaintiff and accepted by the defendants was conditional upon a formal contract being executed by the parties.

The plaintiff's letter, written to the defendants' agents for the sale of the property, was in the following terms: “Dear Sirs, I understand that the premises known as the Connaught Club, Marble Arch, are held by your clients

C. A.
1920
ROSSDALE
v.
DENNY.
—

Major Denny and Mr. Denny for a term of years expiring about 1998 at a ground rent of 1400*l.*, with the benefit of the letting of the shops underneath. I hereby beg to offer 75,000*l.* for the property, the price to include fixtures, fittings, furniture, linen, etc., and utensils on the premises and in store-rooms, also goods removed to Messrs. Maples' Depository, of all of which effects you will furnish inventories to me. I am prepared to pay 7500*l.* deposit on signing of formal contract, completion to take place 14 days after you are in a position to give vacant possession. This offer is subject to a formal contract to embody such reasonable provisions as my solicitors may approve, and to the lease containing no unusual provisions or covenants. Kindly let me know that this offer is accepted, and please instruct your clients to send draft contract to Messrs. Collyer-Bristow & Co., 4 Bedford Row, as soon as possible."

That letter was answered on the same day by a member of the firm of Yates & Yates, the defendants' agents: "Dear Sir, Connaught Club, Marble Arch. In reply to your letter of even date I am instructed to accept on behalf of my clients, Major Denny and Mr. Denny, the offer therein contained, and I will communicate with Major Denny at once so that he may instruct his solicitors to prepare formal contract."

The letters were the outcome of negotiations which had taken place between the parties during a period of about three weeks preceding August 20, 1919.

After that date a correspondence ensued between the respective solicitors of the plaintiff and the defendants relating to the preparation of a draft formal contract. It appeared that the plaintiff's object in acquiring the property was to turn it into an hotel. In the course of the correspondence the plaintiff's solicitors pointed this out to the defendants' solicitors and drew attention to the fact that the lease prohibited it, and requested that before contracts were actually exchanged a licence should be obtained authorizing the lessee to use the premises as an hotel.

On September 23 the defendants' solicitors wrote to the

plaintiff's solicitors: "Dear Sirs, We have seen Major Denny to-day on the subject of the alteration in the draft contract. He cannot agree to the stipulations made by and on behalf of your client and wishes the matter to be considered at an end." This position being insisted upon by the defendants, notwithstanding that the plaintiff was prepared to approve the agreement as submitted by the defendants' solicitors without any alteration, the plaintiff issued the writ in this action.

C. A.
1920
ROSSDALE
v.
DENNY.

The action was tried on June 1, 1920.

Clauson K.C. and *Errington* for the plaintiff.

Romer K.C. and *R. G. Nicholson Combe* for the defendants.

1920. June 2. RUSSELL J. [after stating the nature of the question]. Numerous authorities exist upon this question, and a careful selection of them has been produced to me by both sides. The result of them may, I think, be fairly stated in this way: they are unanimous in this, that the question is one entirely depending upon the true construction of the documents. If upon the true construction of the documents the reference to a formal contract amounts to an expression of a desire on the part of one or other of the parties, or both, that their already complete contract should be reduced into a more formal shape, then the fact that no such contract has been executed is no defence to the action, but the original and complete contract survives and may be enforced. If, on the other hand, the true construction of the documents is this, that either the offer or the acceptance was conditional only, then the non-execution of a formal contract affords a defence to the action upon the ground that the parties really did not intend to be bound until a formal document had in fact been executed.

I will now refer to some of the authorities and first to *Winn v. Bull* (1), a decision of Sir George Jessel M.R. [His Lordship stated the facts of that case and continued:] Sir George Jessel in his judgment (2) says this: "I am of

(1) (1877) 7 Ch. D. 29.

(2) 7 Ch. D. 30.

C. A. opinion there is no contract. I take it the principle is clear.
 1920 If in the case of a proposed sale or lease of an estate two
 ROSSDALE persons agree to all the terms and say, 'We will have the
 v. terms put into form,' then all the terms being put into
 DENNY. writing and agreed to, there is a contract. If two persons
 Russell J. agree in writing that up to a certain point the terms shall
 be the terms of the contract, but that the minor terms shall
 be submitted to a solicitor, and shall be such as are approved
 of by him, then there is no contract, because all the terms
 have not been settled." There, it is to be observed, he was
 dealing with the case of a proposed sale or lease of an estate ;
 he is covering the whole ground. Then he deals more
 specifically with the case of buying an estate, and then he
 says when you come to a contract for a lease the case is still
 stronger, and then, after referring to *Chinnock v. Marchioness*
of Ely (1) and *Rossiter v. Miller* (2) (then only in the Court
 of Appeal) he concludes his judgment in these terms : "It
 comes, therefore, to this, that where you have a proposal
 or agreement made in writing expressed to be subject to
 a formal contract being prepared, it means what it says ;
 it is subject to and is dependent upon a formal contract
 being prepared. When it is not expressly stated to be subject
 to a formal contract it becomes a question of construction,
 whether the parties intended that the terms agreed on should
 merely be put into form, or whether they should be subject
 to a new agreement the terms of which are not expressed in
 detail." Be it observed that in that case Sir George Jessel
 came to the conclusion on the construction of that document
 that it really was a condition precedent to liability that
 there should be a formal contract in writing. *Bonnewell v.*
Jenkins (3) illustrates the other line of view. [His Lordship
 read the headnote of that case and continued :] Fry J.
 puts it in this way : "Now if the matter were not covered
 by decision, it is very probable that I should feel myself
 drawn to the conclusion that wherever there is a reference
 to a future contract the letters themselves do not constitute

(1) (1865) 4 D. J. & S. 638.

(2) (1877) 5 Ch. D. 648.

(3) (1878) 8 Ch. D. 70, 72, 73, 74.

a contract, and for this very obvious reason, that a reference to a contract as a future thing seems to negative the notion of the existence of a contract as a present thing. But it is too late for that argument to be used before me successfully, when a long series of cases has established this proposition, that the mere reference to a future contract is not enough to negative the existence of a present one; and that principle has been very clearly expressed by the present Master of the Rolls in the case of *Crossley v. Maycock*.” (1) Then he cites a passage from what the Master of the Rolls says in that case which I may as well read: “His Lordship there says: ‘The principle which governs these cases is plain. If there is a simple acceptance of an offer to purchase, accompanied by a statement that the acceptor desires that the arrangement should be put into some more formal terms, the mere reference to such a proposal will not prevent the Court from enforcing the final agreement so arrived at. But if the agreement is made subject to certain conditions then specified or to be specified by the party making it, or by his solicitor, then until those conditions are accepted there is no final agreement such as the Court will enforce.’” Then Fry J. proceeds: “I am, therefore, bound to inquire to which of these two categories the present acceptance belongs, and I come to the conclusion that it is a simple acceptance of the offer made by the plaintiff, accompanied by a mere statement of an intention that that arrangement shall be reduced into a formal contract.” Fry J.’s decision was referred to the Court of Appeal, and in the Court of Appeal James L.J. said this: “I am clearly of opinion that the order of Fry J. ought to be affirmed. Whether there is a binding contract or not depends on the construction of two letters. It is settled law that a contract may be made by letters, and that the mere reference in them to a future formal contract will not prevent their constituting a binding bargain. There are indeed cases, such as *Rossiter v. Miller* (2)” —that again, of course, is in the Court of Appeal—“where the Court

C. A.

1920

ROSSDALE

v.

DENNY.

Russell J.

(1) (1874) L. R. 18 Eq. 180.

(2) 5 Ch. D. 648.

C. A.
1920
ROSSDALE
v.
DENNY.
Russell J.

may hold that the reference to the future contract is such as to show that the parties did not intend to be bound until it was signed, but such cases depend on their own special circumstances."

Baggallay L.J. said: "The signature of such a contract may be made a condition precedent to the existence of any binding bargain, but the letter must be expressed in such a way as to show clearly that such a condition is intended, and that is not the case here." Thesiger L.J. was of the same opinion. He said: "The principle established by the authorities is, that a simple acceptance by letter of a written offer to purchase may constitute a contract to sell, although it refers to the preparation of a more formal contract," and then he concludes by saying: "The mere reference to the preparation of an agreement by which the terms agreed upon would be put into a more formal shape does not prevent the existence of a binding contract." After those two authorities each of which is a sample of one of the different lines of decisions, *Rossiter v. Miller* (1) went to the House of Lords. The facts of that case have no real relation to those of the case before me, but the principle is well stated there. Lord Hatherley puts it in this way (2): "It has been established for far too long a time, and by some precedents in your Lordships' House, that if you can find the true and important ingredients of an agreement in that which has taken place between two parties in the course of a correspondence, then, although the correspondence may not set forth, in a form which a solicitor would adopt if he were instructed to draw an agreement in writing, that which is the agreement between the parties, yet, if the parties to the agreement, the thing to be sold, the price to be paid, and all those matters, be clearly and distinctly stated, although only by letter, an acceptance clearly by letter will not the less constitute an agreement in the full sense between the parties merely because that letter may say, We will have this agreement put into due form by a solicitor. If it is stated in so many plain and express terms (and in

(1) (1878) 3 App. Cas. 1124.

(2) Ibid. 1143.

Chinnock v. Marchioness of Ely (1) that was the ground on which that case proceeded) that one of the very terms of the agreement itself was that it should not be concluded by the agent employed in the first place to enter into the negotiation, and that it should not be a concluded agreement until a solicitor intervened and drew a formal agreement; if you find that to be a term of the agreement itself, well and good, if not, the agreement stands." There is nothing in *Rossiter v. Miller* (2) that throws a doubt upon the decision and the views expressed by Sir George Jessel in *Winn v. Bull* (3), and just to carry the matter down to date I will refer for this purpose to one of the latest decisions, a case before Parker J. as he then was—namely, *Von Hatzfeldt-Wildenburg v. Alexander*. (4) There the learned judge sums up the result of the authorities in these words: "It appears to be well settled by the authorities that if the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognise a contract to enter into a contract." [His Lordship then considered the construction of the two letters and came to the conclusion that the effect of them was to place the parties in the position of not being bound unless and until a formal contract had been executed between them, and continued:] That of course is enough to dispose of the case, but before parting with it I ought to say this, that after considering all the authorities which have been brought to my attention it would appear that in every case, with two exceptions, where the words "subject to" appear, the documents in those

C. A.

1920

ROSSDALE

v.

DENNY.

Russell J.

(1) 4 D. J. & S. 638.

(2) 3 App. Cas. 1124.

(3) 7 Ch. D. 29.

(4) [1912] 1 Ch. 284, 288.

C. A. cases have been held to amount only to a conditional offer, or a conditional acceptance, as the case might be, but not such as to constitute a binding contract apart from the execution of a formal document. I will not refer to the cases in detail but merely specify them by name: *Winn v. Bull* (1); *Lloyd v. Nowell* (2); *Hawkesworth v. Chaffey* (3); *Page v. Norfolk* (4); *Santa Fe Land Co. v. Forestal Land, Timber and Railways Co.* (5); *Clark v. Robinson* (6); and *Bromet v. Neville*. (7) The two exceptions are these. One is *Filby v. Hounsell* (8) before Romer J., and the reason for the decision is quite plain when the facts are looked at. The learned judge there said: "When the offer is carefully looked at it appears to me that the acceptance was absolute and not conditional." So that case, although the words "subject to" appear therein, is not really an exception to the consistent line of authorities which have all decided in cases where those words appear that the offer is conditional. The other case is *North v. Percival* (9), a decision of Kekewich J. approving his own decision in *Lloyd v. Nowell*. (2) As regards *North v. Percival* (9) I will only say this: that it has been doubted by Parker J. in *Von Hatzfeldt-Wildenburg v. Alexander* (10) and by Neville J. in *Santa Fe Land Co. v. Forestal Land, Timber, and Railways Co.* (5) where he says: "Before parting with the case I wish to add with respect to the decision of Kekewich J. in *North v. Percival* (9) that if that case had come before me I should myself have come to a different conclusion." So that the only remaining exception to the line of authorities to which I have referred is *Lloyd v. Nowell* (2), which did not commend itself either to Parker J. or Neville J., and I will only add that it does not commend itself to me.

For these reasons I think the plaintiff's action fails and must be dismissed.

(1) 7 Ch. D. 29.

(2) [1895] 2 Ch. 744.

(3) (1886) 55 L. J. (Ch.) 335.

(4) (1894) 70 L. T. 781.

(5) (1910) 26 Times L. R. 534.

(6) (1903) 51 W. R. 443.

(7) (1909) 53 Sol. J. 321.

(8) [1896] 2 Ch. 737, 742.

(9) [1898] 2 Ch. 128.

(10) [1912] 1 Ch. 284.

The plaintiff appealed. The appeal was heard on October 21, 1920. C. A.

1920
ROSSDALE
v.
DENNY.

Clauson K.C. and *Errington* for the appellant. The respondents contend that on the letters of August 20, 1919, there is no concluded bargain between the parties but only a conditional agreement subject to the preparation and execution of a formal contract. The words "subject to a formal contract" do appear on the letters and the learned judge has taken the view that when that is so the execution of a further document is a condition precedent to the existence of a binding contract. We rely on *Rossiter v. Miller*. (1) It is submitted that no such principle as Russell J. deduced from the cases is established. Here all the terms of the contract are agreed between the parties. They no doubt contemplated the execution of a formal contract, but unless any alterations were agreed to by the purchaser the letters themselves were intended to constitute a concluded bargain. The execution of a formal contract was not a condition precedent. There is nothing in the letters to make it clear that no binding contract was intended. We also rely on *Bonnewell v. Jenkins* (2) and *North v. Percival*. (3)

Romer K.C. and *R. G. Nicholson Combe* for the respondents were not called upon.

LORD STERNDALÉ M.R. I think this appeal should be dismissed. The question is whether there is a binding contract constituted by two letters which passed between the parties. The transaction constituted was the proposed sale and purchase of leasehold premises called the Connaught Club. Correspondence took place between the parties and their agents and in the result the two letters were written upon which the whole of this matter turns. They were both written on the same day, August 20, 1919, and the question is whether they constitute a binding contract, or whether the offer made in the one and accepted in the other was a mere conditional offer.

(1) 3 App. Cas. 1124.

(2) 8 Ch. D. 70.

(3) [1898] 2 Ch. 128.

C. A. The matter has been discussed in a great number of cases.
 1920 They are of no value upon the construction of the documents
 ROSSDALE before us, as they are decisions upon different words from
 v.
 DENNY. those used here, but they are of value in so far as they lay
 Lord Sterndale down the principle which has to be applied, and I think it
 M.R. cannot be better or more clearly stated than it was by
 ——— Parker J. in *Von Hatzfeldt-Wildenburg v. Alexander*. (1)
 There the learned judge said this: "It appears to be well
 settled by the authorities that if the documents or letters
 relied on as constituting a contract contemplate the execution
 of a further contract between the parties, it is a question
 of construction whether the execution of the further contract
 is a condition or term of the bargain or whether it is a mere
 expression of the desire of the parties as to the manner in
 which the transaction already agreed to will in fact go
 through. In the former case there is no enforceable contract,
 either because the condition is unfulfilled or because the
 law does not recognise a contract to enter into a contract."
 [The Master of the Rolls then read the letters of
 August 20, 1919, and continued:] If upon the construction
 of those letters there is an absolute unconditional offer,
 there is an absolute unconditional acceptance, and the
 question is whether the offer is conditional or absolute.
 Russell J. has held that it is conditional, and I think he
 is right. After deciding that it was conditional he
 confirmed his decision by an inquiry which led him to
 say that there were practically no cases in which the
 words "subject to a formal contract" had been used
 where the offer or acceptance, as the case might be, had
 been held to be unconditional. I am far from saying that
 there may not be an unconditional offer and acceptance
 of a binding contract although the letters may contain the
 words "subject to a formal contract," but certainly those
 words do point in the direction of the offer or acceptance
 being conditional. I do not think it can be put higher than
 that; I think he is well founded in saying that the general
 trend of the decisions has been, where those words occurred,

(1) [1912] 1 Ch. 284, 288.

to hold that the offer or acceptance was conditional. *North v. Percival* (1), which was relied on before him and also to a certain extent in this Court, has been disapproved of by Parker J., as he then was, by Neville J., by Russell J. in this case, and as I gather from the report of the case before Parker J., *Von Hatzfeldt-Wildenburg v. Alexander* (2), by the author or editor of Williams on Vendor and Purchaser, and I am bound to say that I myself share the doubts expressed by those learned persons as to the correctness of that decision. But I do not rest my judgment in this case, any more than Russell J. did, upon those words "subject to"; I rest my decision on this, that looking at the whole transaction and considering the clause in the plaintiff's letter which says "This offer is subject to a formal contract to embody such reasonable provisions as my solicitors may approve, and to the lease containing no unusual provisions or covenants," coupled with the expression "I am prepared to pay 7500*l.* deposit on signing of formal contract," which I think cannot be entirely disregarded, Russell J. was right in saying that, whatever be the view that may be taken of these words, the result is that the formal contract may contain other terms than those which appear in the letter. If the appellant's construction is right—reversing the position—he might have forced upon him—as he is trying to enforce it now—a contract or a lease which did not contain the provisions which his solicitors thought were reasonable and ought to be inserted, and I cannot think that that is the proper interpretation of the letter.

I think the decision of Russell J. was quite right, and the appeal should be dismissed with costs.

WARRINGTON L.J. I agree. Everything has been said that could be said on behalf of the appellant, but that has entirely failed to convince me that my first impression on reading the letters was not correct—namely, that this was plainly a conditional offer. I desire to add that I share

C. A.
1920
ROSSDALE
v.
DENNY.
Lord Sterndale
M.R.

(1) [1898] 2 Ch. 128.

(2) [1912] 1 Ch. 284, 288.

C. A. with the Master of the Rolls and with Parker J. and
1920 Neville J. their doubts as to the correctness of the decision
ROSSDALE in *North v. Percival*. (1)

v.
DENNY.

YOUNGER L.J. The appellant's (the purchaser's) case here is in this sense meritorious in that it is not one in which the vendor is seeking to force upon the purchaser something which the purchaser will not take, it is a case in which the vendor refuses, notwithstanding the letters that have been read, to give to the purchaser anything at all. But I apprehend that in determining the rights of these parties upon these two letters it is quite immaterial how the question arises, the only question being whether they were bound by any contract at all after these letters were exchanged.

Mr. Errington contends that they were so bound, because he construes his client's letter of August 20 as being an invitation to the vendor unconditionally to bind himself to an open contract—an open contract that would be at once binding upon him as such unless on the terms of this letter the purchaser was pleased to accept something less. Now in my opinion apart altogether from authority that is not the sense of this letter in the way in which it would be read by a vendor. It appears to me clear that a vendor receiving this letter would be entitled to read it as meaning that the formal contract which is referred to as being the contract subject to which the offer is made is to be a contract which is to embody provisions other than those referred to in the letter, which are to be agreed to by both parties. It makes no difference that the provisions are to be reasonable provisions, because on the construction of the letter the test of reasonableness is to rest entirely with the purchaser. Accordingly the formal contract is to contain provisions other than those contained in the letter with reference to which both parties must agree, and unless you find that both parties are in agreement with reference to those provisions then it appears to me that even on the construction of this letter there is no

bargain between the parties at all. In other words so far as one case can be on a matter of this kind an authority for another it does seem to me that this case is as near *Winn v. Bull* (1) as any case can be.

For these reasons I think the appeal should be dismissed.

Appeal dismissed.

Solicitors for appellant: *Collyer-Bristow & Co.*

Solicitors for respondents: *Nisbet & Co.*

G. A. S.

C. A.
1920
ROSSDALE
v.
DENNY.

In re DAVIDSON'S PATENTS.

[1920. D. 470.]

C. A.
1920
SARGANT J
July 7, 30.

In re GASKIN'S PATENTS.

[1920. G. 765.]

C. A.
1920
Oct. 25, 26.

Patent—Practice—Loss or Damage due to Hostilities—Prolongation of Term—Originating Summons—Time for making Application—Order of Special Judge directing Summons to stand over with Liberty to apply—"Decision"—Order, whether subject to Appeal—Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 18; s. 92, sub-s. 2—Patents and Designs Act, 1919 (9 & 10 Geo. 5, c. 80), s. 7, sub-s. 3, s. 20, Sch.

D., who claimed to have suffered loss or damage by reason of hostilities, applied by originating summons under s. 18 of the Patents and Designs Act, 1907, as amended by s. 7 of the Patents and Designs Act, 1919, for the extension of the terms of eight several patents granted in the years 1911 to 1915 inclusive. The G. L. B. Syndicate, Ltd., made a similar application in respect of three patents granted in the years 1912, 1915 and 1916 respectively:—

Held by Sargent J. that the well-settled practice as to applications for the extension of the terms of letters patent existing prior to the passing of the Patents and Designs Act, 1919—namely, that the application had to be made very shortly before the six months prior to the expiration of the patent—had not been materially altered by s. 7 of that Act; and accordingly, that an application for prolongation under that section must be made as a general rule quite a short time before the expiration of the patent.

Held, also, that the "loss or damage" through hostilities, mentioned

(1) 7 Ch. D. 29.

C. A.

1920

DAVIDSON'S
PATENTS,
*In re.*GASKIN'S
PATENTS,
In re.

in s. 7, sub-s. 3, of the Act of 1919, referred to loss or damage suffered during the whole term of the patent, and not merely to that which was suffered during a portion of that term.

Held, further, that in neither of the cases was there any special circumstance to justify a departure from the general rule, and that the summonses must therefore stand over generally with liberty to restore at a later date.

D., with leave of the judge, appealed. On a preliminary objection taken by the Comptroller-General of Patents that no appeal lay from the order of Sargent J. :—

Held, that the order was a "decision" within the meaning of s. 92, sub-s. 2, of the Act of 1907 as amended by s. 20 of the Act of 1919 and the schedule thereto.

Held, also, that the procedure by originating summons, introduced by s. 7, sub-s. 3, of the Act of 1919, was merely substituted for or alternative to the former procedure by petition, and that by reason of s. 92 of the Act of 1907 as amended by s. 20 and the schedule to the Act of 1919, the decision of the judge selected by the Lord Chancellor was final in every case with the exception mentioned in the schedule—namely, an order revoking or confirming the revocation of a patent.

Held, therefore, that the preliminary objection must prevail and the appeal be dismissed.

SAMUEL CLELAND DAVIDSON obtained the grant of eight letters patent—namely, No. 25,256 of 1911, No. 11,470 of 1912, No. 13,438 of 1913, No. 22,138 of 1914, No. 22,489 of 1914, No. 22,490 of 1914, No. 7,168 of 1915, and No. 16,400 of 1915. The first four of these patents were for improvements in the treatment of latex, and the other four were for improvements in rubber or latex apparatus or machinery.

Thomas Herbert Gaskin obtained the grant of three letters patent, one of them, No. 10,943 of 1912, being for an improved life-saving raft, and the other two, No. 10,315 of 1915 and No. 107,779 of 1916, being for improvements in reversible boats.

By s. 6 of the Patents and Designs Act, 1919, it is provided that the term limiting the duration of patents shall be increased from 14 to 16 years, and that any patent the original term of which had not expired at the date of the commencement of the Act of 1919 shall have effect as if the term mentioned therein was 16 years instead of 14 years, subject to certain conditions which are not material to this report. It is provided by s. 18, sub-s. 1, of the Patents and Designs Act, 1907, that "a patentee may, after advertising

in manner provided by rules of the Supreme Court his intention to do so, present a petition to the Court praying that his patent may be extended for a further term, but such petition must be presented at least six months before the time limited for the expiration of the patent." Sub-s. 4 provides that "the Court, in considering its decision, shall have regard to the nature and merits of the invention in relation to the public, to the profits made by the patentee as such, and to all the circumstances of the case." And sub-s. 5 provides that "if it appears to the Court that the patentee has been inadequately remunerated by his patent, the Court may by order extend the term of the patent for a further term not exceeding seven, or, in exceptional cases, fourteen years. . . ."

C. A.
1920
DAVIDSON'S
PATENTS,
In re.
GASKIN'S
PATENTS,
In re.
—

Sect. 7 of the Act of 1919 is, so far as is material, as follows :
“(1.) At the end of sub-section 1 of section eighteen of the principal Act”—the Act of 1907—“which relates to the extension of the term of a patent, the following proviso shall be inserted : ‘Provided that the Court may in its discretion extend such period within which such a petition may be presented.’
(2.) In sub-section 5 of the same section, for the words ‘for a further term not exceeding seven years, or, in exceptional cases fourteen years,’ there shall be substituted the words ‘for a further term not exceeding five years, or, in exceptional cases, ten years.’
(3.) At the end of the same section, the following sub-section shall be added : ‘(6.) Where, by reason of hostilities between His Majesty and any foreign State, the patentee as such has suffered loss or damage (including loss of opportunity of dealing in or developing his invention owing to his having been engaged in work of national importance connected with such hostilities) an application under this section may be made by originating summons instead of by petition, and the Court in considering its decision may have regard solely to the loss or damage so suffered by the patentee.’”

On March 15, 1920, Davidson claimed by *ex parte* originating summons that, by reason of hostilities between His Majesty and certain foreign states, he, as patentee, had

C. A. suffered loss or damage, and for an order under s. 18 of
 1920 the Act of 1907, as amended by s. 7, sub-s. 3, of the Act
 DAVIDSON'S of 1919, that the respective terms of his patents might be
 PATENTS, extended in each case for a further term of five years or
In re. for such other term as the Court should think fit, having
 GASKIN'S regard to the loss or damage suffered by the applicant as
 PATENTS, aforesaid.
In re.

The G. L. B. Syndicate, Ltd., the assignee of Gaskin's patents, also issued an ex parte originating summons, asking that the terms of those patents respectively might be extended for such terms as to the Court might seem fit.

Both summonses were adjourned into Court and heard on July 7, 1920.

Sir Arthur Colefax K.C. and *L. W. Byrne* for Davidson. Sect. 7 of the Act of 1919 makes two material changes in s. 18 of the Act of 1907. One is as to the term for which extension may be granted, and the other is by the addition of sub-s. 6, which is new. As regards the word "loss" in that sub-section, a patentee might suffer loss by working or by not being allowed to work.

[SARGANT J. The words in brackets seem to exclude the case of mere loss of opportunity which is not owing to engagement in work of national importance connected with hostilities.]

One need not deal with that point now. The present case is rather a case of damage than of loss, and seems to come within the words in brackets, which are not restricted to work in the service of the Crown.

[SARGANT J. I agree there.]

Sub-s. 6 says that "the Court in considering its decision may have regard solely to the loss or damage so suffered by the patentee," and the word "may" should be read as "shall." "When a statute confers an authority to do a judicial act in a certain case, it is imperative on those so authorized to exercise the authority when the case arises, and its exercise is duly applied for by a party interested, and having the right to make the application": per Lord

Blackburn in *Julius v. Bishop of Oxford* (1) quoting *Macdougall v. Paterson* (2); *Rex v. Mitchell*. (3) It is significant that sub-s. 1 of s. 7 says that "the Court may in its discretion" extend the period, while the words "in its discretion" are omitted from sub-s. 6.

C. A.
1920
DAVIDSON'S
PATENTS,
In re.
GASKIN'S
PATENTS,
In re.

If it is shown that the patentee has suffered loss or damages by hostilities, the question of profits does not arise, and where such loss or damage has been suffered by the patentee, the Court ought to extend the term at once, and give him an extension of five years.

Austen-Cartmell for the Comptroller-General of Patents. Sect. 18 of the Act of 1907 and s. 7 of the Act of 1919 must be read together. The result of such a reading will be to show that the practice as to when applications for prolongation are to be entertained is not altered. These applications can only, even now, be effectively dealt with on the eve of the death of the patent. Hostilities—the war—may at first have prejudiced the patentee, but later on it may be found that the war has not been an evil to him but a blessing. No doubt, war may have been a temporary block to development, but any loss thereby occasioned may be diminished, or wiped out, or turned into a gain before the original term of the patent has expired. Sect. 7 of the Act does not repeal s. 18 of the Act of 1907 but only grafts special provisions as to the earlier sections. The time has not yet arrived for listening to an application to extend the terms of the patents. The Court might refuse to make any order at present without prejudice to an application later on. [He also referred to *In re Brown's Patent*. (4)]

Sir Arthur Colefax K.C. in reply.

R. Moritz was heard in support of the application by the G. L. B. Syndicate, Ltd.

Cur. adv. vult.

1920. July 30. SARGANT J. Both these applications are made by originating summons under the additional provisions

(1) (1880) 5 App. Cas. 214, 242.

(3) [1913] 1 K. B. 561.

(2) (1851) 11 C. B. 755; 21 L. J.

(4) [1920] W. N. 153.

(C. P.) 27.

C. A. 1920
DAVIDSON'S PATENTS,
In re.
GASKIN'S PATENTS,
In re.
Sargant J.

which, by s. 7 of the Patents and Designs Act, 1919, have been introduced into s. 18 of the Patents and Designs Act, 1907, as sub-s. 6 of that section. In the first case the application is for the extension of eight several patents granted in the years 1911 to 1915 inclusive; and in the second case the like application is made in respect of three patents dated in the years 1912, 1915 and 1916 respectively. In each case, therefore, the application is made a long while before the expiration of any of the patents; and in each case objection is taken by the Comptroller that the question of extension ought not to be dealt with till shortly before the expiration of the patents sought to be extended. The question thus raised is one which will affect a large number of applications pending and prospective, and on which I understand that there has been some difference of opinion among those specially conversant with or engaged in these matters. It is for this reason, rather than from any real doubt, that I have reserved judgment.

In considering the effect of s. 7 of the Act of 1919 the first and most important feature is that the section operates, not by way of independent enactment, but by way of addition to and insertion in s. 18 of the Act of 1907. And further, in making this addition the Legislature had definitely in mind the question of the appropriate time for making applications for extension, since a proviso is added to sub-s. 1 of the original section for the purpose of extending the time previously fixed for the presentation of petitions. It is therefore reasonably clear that, except so far as alterations are expressly introduced or are necessarily involved, an extension under the new procedure by originating summons was intended to be applied for and granted on the same general lines, in relation to time and otherwise, as those on which extensions had previously been dealt with, though, no doubt, by a cheaper procedure.

Now nothing was better settled, as regards the existing practice in relation to extensions, than that they had to be applied for very shortly before the six months prior to the expiration of the patents in question. And there is therefore strong *prima facie* ground for concluding that extensions

by originating summons should also be sought at or about the same period.

But it was argued that the sole reason for insisting that petitions should be presented shortly before the expiration of a patent was that the Court might be in a position to judge of the adequacy of the remuneration of the patentee, and that in the case of applications under the new sub-s. 6 inadequacy of remuneration was not a relevant factor. This argument involves reading the word "may" towards the end of the new sub-section as being equivalent to "shall," and I do not think that this construction is admissible. In my view, the word "may" in the new sub-s. 6 is used in express contrast with the word "shall" towards the beginning of sub-s. 4; and the effect of sub-s. 6 is merely to give the Court a power and discretion to disregard in appropriate cases the considerations which the Court is bound to regard under sub-s. 4.

There may be many cases in which the Court will, in the exercise of its discretion, have regard solely to the loss and damage suffered by the patentee. On the other hand, there may well be other cases under sub-s. 6 where the remuneration of the patentee has been altogether excessive, or the patentee has been quite inert, or the prolongation might be likely to be injurious to the industry of the country, or where there are other circumstances markedly unfavourable to an extension; and in such cases the Court might not be justified for the purpose of its decision in considering solely the loss or damage suffered by the patentee. And it is, in general, impossible to judge in which way the Court should exercise its discretion until a patent has nearly expired. Further, when the new sub-s. 6 speaks of its appearing to the Court that the patentee, as such, has suffered loss or damage, it seems to me that reference is being made rather to loss or damage suffered during the whole term of the patent, than to loss or damage suffered during a portion of that period. It may well be that, in certain cases, though a patentee has, down to the present time, suffered loss or damage by reason of the war, such loss or damage may, prior to the expiration of the patent, be made

C. A.

1920

DAVIDSON'S
PATENTS,
*In re.*GASKIN'S
PATENTS,
In re.

Sargant J.

C. A. good in whole or part, or even be converted into a gain, by
1920 reason of subsequent circumstances also arising out of or in
DAVIDSON'S connection with the war.
PATENTS,
In re.

GASKIN'S I do not think that a reading of the section would be justified
PATENTS, under which a patentee, who thought he was approaching
In re. the end of his losses as a patentee and had expectations of
Sargant J. recouping the whole or part of those losses, should be at liberty
 to select such a time for his application to the Court as would
 enable him to prove the maximum amount of loss and obtain
 the maximum extension of his patent. It may further be
 observed that a system under which applications of the kind
 should be entertained at a comparatively early period in the
 life of a patent would result in the prolongation of a large
 number of patents, with very little ultimate benefit to the
 patentees, but with considerable inconvenience to the public.
 Many patents which seem, in their early years, to be worth
 an application for extension, may, towards the end of their
 original lives, be recognized as being obsolete, or superseded,
 or otherwise not worth the trouble and expense of any such
 application. It would be highly inadvisable that the lives
 of patents of this kind should have been prolonged previously
 to the discovery of their comparative worthlessness.

The advantages urged for considering the matter at once were mainly these: First, that it would be, or might be, more easy to prove loss or damage shortly after it had occurred than at a later period; and, secondly, that it would be convenient to the patentees to know at an early stage what commercial interests they had to dispose of to purchasers. I feel the weight of those considerations, but they are considerations of convenience only, and I do not think that they are sufficient to counterbalance the reasons already given.

For these reasons I am of opinion that, as a general rule, at least, applications under the new sub-section should, like those under the previous practice, be made quite a short time before the expiration of the patents in question; and I do not find, in either of the cases now in question, any special circumstances sufficient to justify a departure from the general

rule. Indeed, the cases in which such a departure would be justified are probably rare, to say the least.

As these applications are the first of the kind, and the practice has not hitherto been settled, I do not dismiss them, but merely direct that they stand over generally, with liberty to the applicants in each case to apply to restore at a later date. Therefore, there will be no order, except that the application in each case stands over till a date nearer to the time for the expiration of the patent.

His Lordship also said that he doubted whether an appeal lay, but that if he could give leave to appeal, the leave would be given in each case.

F. E.

Davidson, with the leave of the judge, appealed. The appeal came on for hearing on October 25, 1920. On its being opened a preliminary objection was taken on behalf of the Comptroller-General that no appeal lay from the order of Sargant J.

By s. 92 of sub-s. 2 of the Act of 1907, as amended by s. 20 and the schedule to the Act of 1919, "Where by virtue of this Act a decision of the comptroller is subject to an appeal to the Court, or a petition may be referred or presented to the Court, the appeal shall, except in the case of a petition for the revocation of a patent under s. 25 of this Act, and subject to and in accordance with rules of the Supreme Court, be made, and the petition referred or presented to such judge of the High Court as the Lord Chancellor may select for the purpose. An appeal shall not lie from any decision of such judge except in the case of an order revoking or confirming the revocation of a patent."

H. O. Danckwerts (*Austen-Cartmell* with him) for the Comptroller-General took the preliminary objection that the order of Sargant-J. was a final order, and that no appeal lay from it.

By s. 18, sub-s. 1, of the Act of 1907 a patentee is entitled to present a petition to the Court praying that his patent may be extended for a further term. By s. 7, sub-s. 3, s. 18

C. A.

1920

DAVIDSON'S
PATENTS,
In re.

GASKIN'S
PATENTS,
In re.

Sargant J.

C. A.

C. A. is amended by the addition of a new sub-section (sub-s. 6).
1920 That sub-section provides that where by reason of hostilities
DAVIDSON'S PATENTS, between His Majesty and any foreign state the patentee as
In re. such has suffered loss or damage an application under
GASKIN'S PATENTS, the section may be made by originating summons instead
In re. of by petition. The effect of that amendment is to introduce
— the cheaper form of proceeding by originating summons
for that by petition. By s. 92, sub-s. 2, of the Act of
1907 it is provided that where a petition may be presented
to such judge of the High Court as the Lord Chancellor
may select for the purpose the decision of that judge shall
be final except in the case of an appeal from a decision
of the comptroller revoking a patent. That sub-section has
now been amended by s. 20 of the Act of 1919 and the
schedule thereto in which it is provided that "An appeal
shall not lie from any decision of such judge except in the
case of an order revoking or confirming the revocation of a
patent." There is therefore no appeal from the order of the
special judge on a petition or on an originating summons,
which is substituted for a petition, extending or refusing
to extend the term of a patent.

Sir Arthur Colefax K.C. and *L. W. Byrne* for Davidson.
The order of Sargant J. is not a "decision" on the question
whether the appellant's patents should be extended. It is
merely an interlocutory order from which he appeals with
the leave of the judge. It is not a decision on the merits
and is not a decision contemplated by s. 92, sub-s. 2,
as amended as non-appealable. The judge has postponed
the hearing of the appellant's application and it is from that
postponement that he appeals. The sub-section prevents
and was intended to prevent an appeal on the merits. It
only means that the decision of the special judge is to be
final, as to whether or not there shall be an extension of the
term of a patent.

It is submitted that the word "may" in the new sub-s. 6
of s. 18 of the Act of 1907 is directory, and that Sargant J.
took an erroneous view of the meaning of the sub-section,
and of the nature of his jurisdiction.

The meaning of sub-s. 2 of s. 92 is, it is submitted, that it is only where a petition is presented to the special judge for prolongation of a patent his decision is to be final, and that proceedings by way of originating summons do not come within that sub-section.

[YOUNGER L.J. Would an interlocutory order made in the course of a proceeding by petition be appealable?]

It is submitted that it would be so.

[WARRINGTON L.J. Then the position would be this, that an applicant might go to the House of Lords on an interlocutory order, but that an order on the merits would be final.]

The new sub-s. 6 added to s. 18 of the Act of 1907 does not give any new right; it merely introduces a new form of procedure. The only part of s. 92, sub-s. 2, as amended, which says that an order shall be final refers to the petition. It does not say that if the matter is brought before the special judge on an originating summons his decision shall be final. Sect. 92 is not limited to petitions for the prolongation of a patent. By Order LIIIA., r. 4: "All appeals from the Court from any decision of the comptroller under sections 20 (restoration of lapsed patents), 26 (revocation of patents), or 27 (revocation of patents worked outside the United Kingdom) of the Act shall be brought by petition presented to the Court within one calendar month of the decision of the comptroller or within such further time as the Court may under special circumstances allow."

If the order of Sargant J. stands there are no means by which relief can be obtained in the event of a patentee dying before the expiration of his patent or in the event of a patent being assigned after the conclusion of hostilities.

[WARRINGTON L.J. "Patentee" is defined by s. 93 of the Act of 1907 as "the person for the time being entitled to the benefit of a patent."]

The wording of that definition is altered by s. 19 of the Act of 1919 which defines "patentee" as "the person for the time being entered on the register as the grantee or proprietor of the patent." An inventor therefore loses his right

C. A.

1920

DAVIDSON'S
PATENTS,
In re.

GASKIN'S
PATENTS,
In re.

C. A. to compensation for any loss by the mere accident of not
1920 living until within a few months of the expiration of his patent,
DAVIDSON'S and is penalised if he assigns his patent.
PATENTS,

In re.

GASKIN'S
PATENTS,
In re.

LORD STERNDALÉ M.R. I regret extremely the decision to which I feel bound to come in this case, and if there is any way of discovering that we are wrong, and it is discovered that we are, I shall certainly not be sorry, because the result of our present decision is that the point raised by this appeal cannot be considered in this Court, and therefore of course cannot be considered in the House of Lords. The point is, to my mind, a very important one indeed, as it was to the mind of the learned judge in the Court below; and it is whether there is or is not an appeal from what Sargant J. did (to use a neutral term for the moment) on the hearing of a summons before him under the Patents and Designs Act of 1919. The summons was taken out by the appellant for the prolongation of his patents on the ground that he had sustained loss or damage by reason of hostilities between His Majesty and a foreign State. Sargant J. considered the matter, and came to the conclusion, for the reasons which he gave, to which I shall refer only so far as is necessary and proper, as we are not hearing the appeal—that on the construction of the statute before him the summons had been taken out too soon, and that it was right that it should be dealt with under the old practice as to petitions for prolongation of patents—namely, that it should not be heard until some time near to the expiration of the patents. He thought that was a general rule, and saw no special circumstance in the case to take it out of that rule. He therefore made an order in the following terms: “This Court doth not now think fit to make any order on the said application, but doth order that the same do stand over until a day nearer to the expiration of the above-mentioned letters patent with liberty to apply to restore.” That order is, to my mind, a decision that the application was premature, and for that reason ought to stand over.

The first point, perhaps, with which I ought to deal is this:

Is that a decision? In my opinion, it clearly is. A decision that an application is premature and therefore must stand over is, in my opinion, a decision on the application.

C. A.

1920

DAVIDSON'S
PATENTS,
In re.

GASKIN'S
PATENTS,
In re.

Lord Sterndale
M.R.

The sections under which the matter arises are s. 18 and s. 92, sub-s. 2, of the Act of 1907, and s. 7, sub-s. 3, of the Act of 1919, which is an amending sub-section to s. 18. I need not read s. 18 at any length. It is the section which enables a patentee to ask for an extension of his patent. By sub-s. 4 it is provided that "The Court, in considering its decision, shall have regard to the nature and merits of the invention in relation to the public, to the profits made by the patentee as such, and to all the circumstances of the case." The Court, therefore, in hearing the application has to consider all the circumstances of the case, including those which are specially mentioned. Sect. 92, sub-s. 2, as it stood before the Act of 1919, was as follows: "Where by virtue of this Act a decision of the comptroller is subject to an appeal to the Court, or a petition may be referred or presented to the Court, the appeal shall, subject to and in accordance with rules of the Supreme Court, be made and the petition referred or presented to such judge of the High Court as the Lord Chancellor may select for the purpose, and the decision of that judge shall be final, except in the case of an appeal from a decision of the Comptroller revoking a patent on any ground on which the grant of such patent might have been opposed." The Act of 1919 by s. 7 (after making certain amendments which are not relevant to the present case) provides in sub-s. 3: "At the end of the same section"—that is s. 18 of the principal Act—"the following sub-section shall be added:—'(6) Where, by reason of hostilities between His Majesty and any foreign State, the patentee as such has suffered loss or damage (including loss of opportunity of dealing in or developing his invention owing to his having been engaged in work of national importance connected with such hostilities) an application under this section may be made by originating summons instead of by petition, and the Court in considering its decision may have regard solely to the loss or damage so suffered by the patentee. . . .'" It

C. A. seems to me that the matters mentioned in the new sub-s. 6—
 1920 namely, the suffering of loss or damage—would have been
 DAVIDSON'S circumstances which the Court without any such sub-section
 PATENTS, would have considered, amongst others, under s. 18 of the
In re. principal Act; and the result of the enactment in this sub-
 GASKIN'S section seems to me to be this: that these matters (amongst
 PATENTS, others) which could formerly only have been brought before
In re. the Court by petition can now under the sub-section first be
 Lord Sterndale brought in another way—namely, by originating summons
 M.R. instead of by petition; and, secondly, when so brought the
 Court may have regard solely to the circumstances of loss
 or damage, and is not obliged to consider the other circum-
 stances which are mentioned or alluded to in s. 18.

There is a further amendment in the schedule to the Act of 1919 which is called a schedule of minor amendments, the result of which is that sub-s. 2 of s. 92 of the principal Act now reads in this way: "Where by virtue of this Act a decision of the Comptroller is subject to an appeal to the Court, or a petition may be referred or presented to the Court, the appeal shall, except in the case of a petition for the revocation of a patent under section 25 of this Act, and subject to and in accordance with rules of the Supreme Court, be made, and the petition referred or presented to such judge of the High Court as the Lord Chancellor may select for the purpose. An appeal shall not lie from any decision of such judge except in the case of an order revoking or confirming the revocation of a patent." The learned judge decided, as I understand, that the word "may" in s. 7 of the Act of 1919, or rather, I should more correctly say, in sub-s. 6 of s. 18 of the principal Act, which is enacted by s. 7 of the Act of 1919, was not to be construed as imperative, as it was argued before him—that is to say it was not to be construed as "shall have regard solely to the loss or damage so suffered by the patentee." He therefore thought that he could consider the other circumstances mentioned in s. 18 of the principal Act, and that, as he could consider them, the proper course was not to hear the summons until near the expiration of the patents, because he thought that he might

have to take into consideration the advantages to the patentee after the cessation of hostilities, as qualifying or modifying the loss or damage sustained during the period of hostilities. The matter has not been argued before us, and therefore I shall say nothing more as to that part of the decision than this : that it is a matter of very great importance, and one upon which there may very well be different opinions ; and that it is unfortunate, in my opinion, that there can be no appeal against his decision ; but I think there cannot be for this reason. This, as I have already said, is to my mind a decision. A decision that a summons is premature and must therefore stand over to be heard at a future date is, in my opinion, a decision. I thought at one time that something might have been made of the words " the decision " in s. 92, sub-s. 2, of the principal Act. It appeared to me that it might be said, and I was rather attracted by the argument, as I should have liked to hold that an appeal existed, that " the decision " meant the final decision, and that the right of appeal was only taken away in the case of the final decision. That would have led, of course, to a very anomalous result, because it would have meant this : that there was no appeal from the final decision on a very important point, but that there might be an appeal to this Court, and to the House of Lords, upon every insignificant point decided on an interlocutory application in the same matter. But it seems to me that any argument that could be drawn from that expression is entirely got rid of by the amendment to the sub-s. 2 of s. 92 in the schedule to the Act of 1919 which I have already read. I do not know that it was intended to make any alteration of the law ; it may have been intended simply to deal with the same decision as the principal Act, but however that may be, the amendment makes it quite clear that you are not to look at one decision, and one decision only, but at any decision of the judge on a summons, because it is " an appeal shall not lie from any decision of such judge except in the case of an order revoking or confirming the revocation of a patent." It is a decision

C. A.

1920

DAVIDSON'S
PATENTS,
*In re.*GASKIN'S
PATENTS,
*In re.*Lord Sterndale
M.R.

C. A. of the judge upon the summons, and it comes directly within
 1920 the words "an appeal shall not lie from any decision of such
 DAVIDSON'S judge except in" the one particular case.

The effect of the new sub-section, as I have said, is only to
 PATENTS, do two things: to enable the applicant to proceed by originating
In re. summons instead of being bound to proceed by petition, and
 GASKIN'S to enable or (as was argued in the Court below) to direct the
 PATENTS, judge to deal only with certain circumstances instead of all
In re. the circumstances. It does not give any new jurisdiction,
 Lord Sterndale except in allowing or directing the judge to deal with one set
 M.R. of circumstances only; it merely introduces a new procedure.
 The words of the sub-section are too strong for us to get over,
 and I think that for these reasons no appeal lies against this
 decision, and this appeal must be dismissed.

WARRINGTON L.J. I am of the same opinion. I join in
 the regret expressed by the Master of the Rolls at being com-
 pelled to hold that no appeal lies in the present case; because
 the decision of Sargant J. is one of the utmost importance to
 patentees who have suffered the particular losses referred to
 in s. 7 of the Act of 1919, inasmuch as, if it is acted on, it
 prevents them from obtaining immediate relief in respect
 of those losses, and it is a decision with regard to which,
 inasmuch as we have not heard the arguments, I will say
 no more than the Master of the Rolls has said—namely,
 that it is a decision as to which there may very well be
 different opinions; but, however, I feel myself compelled
 to come to the conclusion that no appeal lies from it to
 this Court.

The question, and the only question, I think, is this,
 Whether on the true construction of s. 92 of the Patents and
 Designs Act of 1907, as amended by the Patents and Designs
 Act of 1919, and in the events which have happened, an
 appeal lies from the order in question, which directs, for
 reasons of weight, founded on the construction and effect of
 s. 7 of the Act of 1919 and other material sections, and of
 expediency, having regard to the nature of the jurisdiction
 with which the judge was dealing, that the application before

him should stand over generally as having, in his view, been presented prematurely.

The question turns, as I have said, on the true construction of s. 92, sub-s. 2, of the Act of 1907 as amended by the Act of 1919; but in order to understand the true construction of that sub-section it is necessary to refer to the section under which the application in question was made to the Court. That section is s. 18 of the Act of 1907 as amended by s. 7, sub-s. 3, of the Act of 1919; and I propose to read that section as amended; not to read the section first as unamended and then the amendment, but to read it as it stands at the present time, omitting, of course, immaterial provisions. Sect. 18 then is in these terms: "A patentee may, after advertising" in the manner mentioned, "present a petition to the Court praying that his patent may be extended for a further term, but such petition must be presented at least six months before the time limited for the expiration of the patent." Then I will omit sub-ss. 2 and 3 as being irrelevant to the present question, and I come to sub-s. 4: "The Court, in considering its decision, shall have regard to the nature and merits of the invention in relation to the public, to the profits made by the patentee as such, and to all the circumstances of the case." It therefore prescribes in imperative terms what the judge shall have regard to in considering his decision, and in particular that the Court is to have regard to all the circumstances of the case. I omit sub-s. 5, which provides for the relief which the Court may grant in such cases; and I come to sub-s. 6, which is the sub-section introduced by amendment. [His Lordship read the sub-section and continued:] There are two points of importance which arise upon that sub-section. The first is that where the patentee has suffered a particular loss or damage he may make his application for extension not only by petition, but, if he pleases, by originating summons instead of by petition, and the originating summons may ask for an extension on any of the grounds on which, under s. 18, he may be entitled to an extension, and he is not limited to the particular ground mentioned in this sub-s. 6.

C. A.

1920

DAVIDSON'S
PATENTS,
In re.

GASKIN'S
PATENTS,
In re.

Warrington L.J.

C. A. The second point which arises upon the construction of
1920 the sub-section as a whole as amended is this: it is con-
DAVIDSON'S tended that on this particular form of application by origina-
PATENTS, ting summons under sub-s. 6 the judge is compelled to have
In re. regard only to the particular loss or damage mentioned in
GASKIN'S the sub-section. I cannot accept that contention. It seems
PATENTS, to me again, when s. 18 is read, as to my mind is the only
In re. legitimate way of reading it, as a whole as amended, the
Warrington L.J. true effect of sub-s. 4 and of sub-s. 6 together is that whereas
if the patentee has not proceeded as is provided by sub-s. 6,
or, at any rate, if he has not suffered the particular loss or
damage there specified, the Court is bound to have regard
to all the circumstances of the case; that where he does
bring himself within sub-s. 6 the Court is at liberty, if it
pleases, to reject all the other circumstances and to have
regard to this particular circumstance only; but that there
is nothing to prevent the judge, if he so pleases, from having
regard to all the circumstances of the case, and for this
obvious reason that there may be circumstances which
would materially affect the importance of the particular loss
or damage which the patentee is said to have suffered.

With those preliminary observations as to the construction
of s. 18 as amended, which seem to me to be material on the
construction of s. 92, sub-s. 2, I come to that sub-section,
and I propose to take the same course with regard to it
as I have taken with regard to s. 18, and to read it as
amended by the Act of 1919. The amendment is effected
in a curious way. Sect. 20 of the Act of 1919 provides:
"The amendments specified in the second column of the
Schedule to this Act, which relate to minor details, shall be
made in the provisions of the principal Act specified in the
first column of that Schedule." Now I will read s. 92, sub-s. 2,
as amended. [His Lordship read the sub-section as amended
and continued:] Before I come to the question that we have
to decide I will just point out one or two matters which seem
to me to be of importance under that sub-section. In the
first place, the petitions which are referred to the special
judge are not to include petitions for revocation of a

patent under s. 25. That takes away, therefore, from the generality of the petitions which are to be referred to the special judge. Petitions for revocation may go to any judge, and are not confined to the special judge; and that explains the exception from the provision that no appeal shall lie from any decision. There is only one exception, and that is in the case of an order revoking or confirming the revocation of a patent. The obvious reason for the insertion of that exception was that, otherwise, inasmuch as an order revoking or confirming the revocation of a patent might be made by any judge, the result would follow that such an order made by the special judge would not be subject to appeal, whereas an order made by any other judge would be. That I think is clear. The second point, is that in other respects the amendment of s. 92, sub-s. 2, increases the class of cases in which the decision of that special judge is not subject to appeal, because there is now struck out from the section the exception in the case of an appeal from the decision of the Comptroller revoking a patent on any ground on which the grant of such patent might have been opposed. It may come back again under the general words of the exception, but it is struck out so far as that particular provision is concerned. The general effect is that the Legislature appears to have intended that orders for revocation of a patent should be subject to appeal, but that no other decision of the special judge should be. The words are that no appeal shall be brought "from any decision of such judge."

Two points have been taken in support of the contention that an appeal will lie. The first is that a proceeding by way of originating summons does not come within the sub-section, because the sub-section only provides for the reference to the special judge of petitions presented to him; but in my opinion that point is answered when you refer to the new sub-s. 6 of s. 18 of the principal Act and find that the procedure may be by originating summons instead of by petition. I think the true effect of that is that in all other respects the proceeding by originating summons shall be

C. A.

1920

DAVIDSON'S
PATENTS,
*In re.*GASKIN'S
PATENTS,
In re.

Warrington L.J.

C. A. subject to the same rules as the proceeding by petition,
1920 and accordingly that the originating summons must, under
DAVIDSON'S s. 92, sub-s. 2, as amended, be assigned to the special
PATENTS, judge, in the same manner as the petition is required to be
In re. presented to that judge.

GASKIN'S The other point taken is that the learned judge has given
PATENTS, no decision at all. In my opinion he has given a decision.
In re. He has, after hearing argument on both sides, come to the
Warrington L.J. conclusion, for reasons of principle which appeared to him
to weigh, that the argument on the one side ought to prevail,
and that the argument on the other side ought not. To
my mind that is giving a decision, and though, as I have
said, I do so with regret, I cannot get out of the words pro-
viding that "an appeal shall not lie from any decision of
such judge," and it is still more difficult to get out of those
words than it might otherwise have been by reason of the
fact that they are substituted for the words "the decision
of that judge shall be final." "The decision of that judge"
might possibly under the latter words have been held to mean
the decision on the merits, but here the words substituted are
so much wider that it is impossible, in my opinion, to give
them that limited construction.

The result, in my opinion, is that no appeal lies from the
order in this particular case, and the appeal must therefore
be dismissed.

YOUNGER L.J. I feel constrained, though with great
reluctance, to arrive at the same conclusion, and I will
confine the few observations which I desire to make to
an expression of my reasons for that reluctance. An
applicant who is given the benefit of this new sub-section
is an applicant who must be of a particular quality. He
must be free of all enemy character and association, and
it will or may be all the better for him, if during the
hostilities referred to in the sub-section he has been engaged
in work of national importance. On the other hand, an
applicant under that sub-section may have no locus to
apply for the extension of his patent under s. 18 of the

Act of 1907 unamended; because he may, before the time for making that application arises, have assigned his patent. Further, an applicant who may be entitled to apply for extension under s. 18 as unamended may be entirely precluded, by reason of the disability to which I have already referred, from applying for any relief at all under the sub-section of the Act of 1919. In these circumstances (and there are many others tending in one direction or in the other which are deserving of most serious consideration) it is clearly of very great importance to determine whether the true view of this new sub-section is, as the learned judge has held, that *prima facie* an application under it should stand over to be dealt with on the final application for extension, although that final application may never be made at all, and when made, may be one which the applicant under the new sub-section may himself not be competent to make. Now that is a question of very great importance, and is so recognized by the learned judge. It is further, a question upon which, as he says, different opinions have been entertained by those who are competent to hold opinions on the question, and the learned judge has himself desired that for his assistance in dealing with future applications under this sub-section he may have the benefit of the views of this Court. In these circumstances it is most unfortunate that, upon what one is constrained to say is the true construction of s. 92, sub-s. 2, as now amended by the Act of 1919, this Court is precluded from affording the learned judge the assistance which he desires.

C. A.
1920
DAVIDSON'S
PATENTS,
In re.
GASKIN'S
PATENTS,
In re.
Younger L.J.

Appeal dismissed.

Solicitor for Davidson : *George Beloe Ellis.*

Solicitors for the G. L. B. Syndicate Ltd. : *Baddeleys & Co.*

Solicitor for Comptroller ; *Solicitor to the Board of Trade.*

W. I. C.

P. O.
LAWRENCE
J.

RICHARDS v. DAVIES.

[1919. R. 547.]

1920

July 14, 15, *Landlord and Tenant—Lease of Farm—Covenant not to underlet or permit any other Person to use or occupy any Part of the Premises—Letting of Grass Keep, i.e., growing Herbage—Breach of Covenant—Agistment.*

Where the tenant of a farm covenants not to underlet or permit any other person to use or occupy any part of the demised premises without the written consent of the landlord, the sale or letting by the tenant (without such consent) in the last year of his tenancy of the grass keep—i.e., growing herbage—of his pasture lands for a definite period, is a breach of the covenant, although such sale or letting is in accordance with the usual practice of an outgoing tenant in that part of the country.

Semble, that agistment—i.e., the taking in by the tenant of the sheep or cattle of another to be depastured on the farm at so much per head per week—would not be a breach of the covenant.

WITNESS ACTION.

By an agreement made on July 12, 1916, between the plaintiff of the one part and the defendant of the other part, the defendant became tenant to the plaintiff of a farm, called the Parsonage Farm, in the parish of Llanthewi Skyrriid in the county of Monmouth, containing in the whole about 97 acres of which about 50 acres were pasture, for one year as from September 29, 1913, and thereafter from year to year until the tenancy was determined by twelve months' notice to quit terminating September 29 in any year. The rent was 97*l.* per annum payable half yearly. The agreement also provided (clause 10) that the tenant should cultivate the lands according to the most approved custom of the neighbourhood applicable to lands of a similar nature. Clause 14: "The tenant shall not underlet or permit any other person or persons to use or occupy any part of the buildings, land or premises without the written consent of the landlord or his agents"; and clause 15 provided, in connection with the determination of the tenancy, that the tenant should have all the usual privileges of an off-going tenant according to the custom of the country, and that on all occasions (except as in the agreement stipulated or in the case of a special agreement)

the custom of the country should be binding upon both parties.

P. O.
LAWRENCE
J.

In September, 1918, the plaintiff gave the defendant notice to quit the farm on September 29, 1919.

1920
RICHARDS
v.
DAVIES.
—

By advertisement in the issue dated May 16, 1919, of the *Abergavenny Chronicle*, the defendant without the consent of the plaintiff or his agents offered to let on May 29, 1919, the whole of the grass keep on the farm for the remainder of his tenancy. Thereupon the plaintiff, on May 28, 1919, commenced this action and the same day obtained an ex parte injunction against the defendant extending over June 6, 1919, restraining the advertised letting of the grass keep on the ground that such letting would constitute a breach of clause 14 of the agreement, and meanwhile served the defendant with a notice of the motion for an interim injunction to restrain the defendant from selling or letting or attempting to sell or let the whole or any part of the grass keep on the farm, and from underletting or permitting any person or persons other than the defendant to use or occupy any part of the premises comprised in the tenancy agreement without the written consent of the plaintiff or his agents. On the hearing of the motion the defendant, without admitting the plaintiff's contention, gave an undertaking not to commit any breach of clause 14 of the agreement, and the plaintiff gave the usual undertaking in damages. The defendant owing to the action did not let the grass keep and gave up possession of the farm on September 29, 1919.

In October, 1919, the defendant declined the suggestion of the plaintiff that the action should be discontinued and that each party should pay his own costs, and the action now came on for trial. The defendant in his defence pleaded that the letting of the grass keep would not have broken any of the terms of the tenancy agreement, and that such letting amounted to no more than the agistment of cattle on the farm, and under the letting of grass keep the cattle of the hirer of the grass keep consumed on the land the grass under the control of the tenant of the farm; that agistment of cattle on land in Monmouthshire was usually effected by a letting

P. O.
LAWRENCE
J.

1920

RICHARDS

v.
DAVIES.

by auction of the grass keep on the land and was in accordance with the most approved custom of the neighbourhood with respect to pasture lands, and was a practice generally adopted when an agricultural tenant disposed of his live stock prior to quitting his holding; and the defendant alleged that he could have let his grass keep for 62*l.* 10*s.* and had suffered loss and damage by reason of the injunction, and he counter-claimed for damages. The plaintiff in his reply alleged that the letting of the grass keep on the farm was essentially different from agistment, and that if there was any such custom or practice in Monmouthshire as alleged in the defence (which he denied) the same was excluded by clause 14 of the agreement. The evidence sufficiently appears in the arguments and judgment.

Owen Thompson K.C. and *Devonshire* for the plaintiff. On the evidence the sale or letting by the defendant of the grass keep or growing herbage of his pasture land for the last four months of his tenancy would have been a breach of clause 14. Such a sale or letting gives the grantee a particular interest in the land in respect of which he can maintain an action of trespass: *Coke on Litt.* 4*b*; *Crosby v. Wadsworth* (1); *Masters v. Green* (2); *Wellaway v. Courtier* (3), and gives him the exclusive right of possession to the growing herbage on the particular fields to be taken by the mouths of his sheep and cattle: it is a profit à prendre: *Leake on Contracts*, 5th ed., p. 166. Agistment is quite a different transaction, it is the taking in by a tenant of the sheep and cattle of another to feed at so much per head per week without reference to any particular fields. It is submitted therefore that the plaintiff was justified in bringing the action and that he is entitled to the costs of it.

Jenkins K.C. and *J. Mackay* for the defendant. The tenancy agreement must be considered as a whole. The defendant relies on clauses 10 and 15 and the custom for an outgoing tenant to let his grass keep in the last year of his

(1) (1805) 6 East, 602, 611.

(2) (1888) 20 Q. B. D. 807.

(3) [1918] 1 K. B. 200.

tenancy. Clause 14 does not strike at the custom which on the evidence is equivalent to agisting: *Rex v. Inhabitants of Croft* (1), but on the plaintiff's contention it negatives agistment. It is submitted that *Masters v. Green* (2) was wrongly decided. Further, there is no breach of the covenant unless the tenant parts with the entire legal possession of the land. "Underletting" is a technical expression and involves "user or occupation" to the exclusion of the tenant, but selling standing crops or trees is not user, nor is allowing another person to bring his cattle to eat off a crop of grass user of the land by the owner of the cattle. Such a grant or licence is not "user" within the meaning of the covenant. The land does not pass. A sort of interest is created in the land which is in the nature of an incorporeal right and is not the subject of trespass: *Mainwaring v. Giles*. (3) The clause must be construed strictly. The words "not to permit any other person to use or occupy" are equivalent to "not to part with the possession of," the tenant's rights in the property. The covenant does not contemplate anything growing on the land, and so long as the tenant retains the legal possession himself there is no breach of the covenant merely because he permits another person to have possession and use of the land for the purpose of feeding his cattle on the growing herbage: *Peebles v. Crosthwaite* (4); Foà's Landlord and Tenant, 5th ed., p. 278. On the evidence the defendant could have let his grass keep and is entitled to judgment on his counterclaim and an inquiry as to damages.

Owen Thompson K.C. in reply cited *Cox v. Glue* (5) and *Cox v. Mousley* (5), and Bullen and Leake on Pleadings, 3rd ed., p. 416.

P. O. LAWRENCE J. after stating the facts said: The plaintiff asks for the costs of the action on the ground that he was justified in commencing it. The defendant on the other hand resists this claim and counterclaims for damages.

(1) (1819) 3 B. & Al. 171, 177.

(3) (1822) 5 B. & Al. 356.

(2) 20 Q. B. D. 807.

(4) (1896) 13 Times L. R. 37, 198.

(5) (1848) 5 C. B. 533, 536.

P. O.
LAWRENCE
J.

1920
RICHARDS
v.
DAVIES.
—

P. O.
LAWRENCE
J.
1920
RICHARDS
v.
DAVIES.
—

He further asks for an inquiry as to damages under the undertaking as to damages given by the plaintiff in the orders containing the ex parte injunction and the undertaking given by the defendant, and contends that the plaintiff ought to pay the costs of the action and counterclaim. The sole question which I have to decide is whether on the true construction of clause 14 of the tenancy agreement a letting of the grass keep on the Parsonage Farm without the consent of the plaintiff is prohibited. In order to solve the question it is essential in the first place to ascertain what is the true effect of letting the grass keep. The evidence has established that such letting is common in Monmouthshire in the case of an outgoing tenant, and that it is indifferently called selling or letting the grass keep, which expressions mean the same thing. The sale or lease of the grass keep on pasture land for a definite period is not to be confounded with agistment or "tacking" as it is locally termed. The latter consists of the taking in by the farmer of another man's sheep or cattle (usually at so much per head per week) without binding himself to depasture them on any particular part of the farm, whereas the former consists of a grant for a definite period (usually in consideration of a lump sum) of the growing grass crop on a specified field or fields. There is no question that a grantee of the grass keep on a field has the exclusive right to take the herbage on that field by the mouths of his sheep and cattle. The question whether he also has the right to mow the herbage and take it off the land is not material to be decided on the present occasion though I think that, regard being had to the evidence given on that point, the better opinion is that he has no such right. Now it is settled by authority which binds me that the grantee of the herbage has a particular right in the land in respect of which he can maintain an action for trespass *quare clausum fregit*, and that a contract for the sale of such a right is a contract for sale of an interest in or concerning land within s. 4 of the Statute of Frauds: see *Coke upon Littleton*, 4b; *Crosby v. Wadsworth* (1); *Masters v. Green* (2); *Wellaway v.*

(1) 6 East, 602.

(2) 20 Q. B. D. 807.

Courtier. (1) The cases of *Cox v. Glue* (2) and *Cox v. Mousley* (2) show that a grant of a right to take the herbage on a certain field by the mouths of the grantee's sheep and cattle involves the grantor parting with the right of possession of the surface of that field during the time of the exercise of such right of pasturage and that he cannot during that time bring an action for trespass against a person riding over that field although he may bring an action of trespass against a person driving stakes into the subsoil of that field. In my opinion it is difficult to see how a grantee of the grass keep on a certain field can enjoy the subject-matter of the grant without occupying the field by his sheep or cattle and without using the field for the purpose of depasturing his sheep and cattle upon it. In my judgment such a grant of necessity involves permission being given by the grantor to the grantee to use and occupy the field during the period of the grant.

P. O.
LAWRENCE
J.

1920

RICHARDS

v.

DAVIES.

Evidence has been adduced on behalf of the defendant to show that it is the custom in Monmouthshire that (in the absence of an express bargain to the contrary) the grantor of the grass keep attends to the sheep and cattle after the grantee has turned them into the field the grass keep on which has been granted to him. Mr. Jenkins contended that this evidence shows that in Monmouthshire at all events the grantor of the grass keep does not give up possession of the field to the grantee and that the latter does not occupy the field. I do not agree that the mere fact that the grantor waters and generally looks after the safety and wellbeing of the sheep and cattle determines the question as to whether the grantee is or is not using or occupying the field. But, apart from that, the evidence is conflicting, and on the whole I have come to the conclusion that the true result of the evidence on this point is that it is a matter of bargain and arrangement between the grantor and grantee as to who is to look after the sheep and cattle. In any event, I think it is clear that any services rendered by the grantor in this respect are services rendered to and on behalf of the grantee and

(1) [1918] 1 K. B. 200.

(2) 5 C. B. 533, 536.

P. O.
LAWRENCE
J.

do not in any way affect the occupancy or the legal rights of the grantee under his grant.

1920
RICHARDS
v.
DAVIES.
—

The main defence to this action relied on by Mr. Jenkins however is that taking the tenancy agreement as a whole the defendant by granting the grass keep on the pasture fields of the Parsonage Farm to a purchaser does not permit the grantee to use or occupy those fields within the meaning of clause 14 of the agreement. He contends, first, that the prohibition against permitting any other person to use or occupy any part of the land is equivalent to a prohibition against parting with the tenant's entire interest in any part of the land, and that the grant of the herbage does not involve the grantor parting with his entire interest in any part of the land but only with a particular interest in the pasture fields—namely, his interest in the herbage growing on those fields. In support of this construction he cited *Peebles v. Crosthwaite*. (1) This case, so far from helping his contention, in my opinion shows that a clear distinction ought to be drawn between the expression “shall not permit any other person to use or occupy” and the expression “shall not part with the possession of,” and I conclude that, if the latter expression had occurred in the lease in that case, Romer J. would have decided it the other way. Mr. Jenkins' next contention is that the expression “use and occupation” of land has acquired a technical meaning and involves the taking of exclusive legal possession of the land by some person in such circumstances as that (in the absence of an agreement that the possession shall be held gratuitously) the person taking possession renders himself legally liable to pay for his use and occupation of the land, and that the utmost that can be said in the present case is that the grantee of the grass keep would have the use and occupation of the herbage—i.e., the use and occupation of an interest in the land and not of the land itself. In my judgment this contention is not sound. In the first place, the expression used in clause 14 is “use or occupation” and not “use *and* occupation”; and secondly, I do not consider that in this clause the words “use or occupy”

(1) 13 Times L. R. 37.

have any such technical or restricted meaning as is sought to be placed upon them by Mr. Jenkins. I have already held that a grant of the grass keep on a certain field necessarily involves permission being given by the grantor to the grantee both to "use" and to "occupy" the field in the ordinary acceptation of those terms, and I see no reason for not giving effect to clause 14 in that sense. Even if, however, contrary to my opinion, the words in question ought to be construed as bearing the technical and restricted meaning contended for, yet it seems to me that according to the cases of *Cox v. Glue* (1) and *Cox v. Mousley* (1) the grant of the grass keep would confer such a right of possession as would satisfy the test contended for by Mr. Jenkins. In the result I hold that the plaintiff was justified in bringing the action, and that the defendant must pay the costs of it. The counterclaim will be dismissed with costs.

P. O.
LAWRENCE
J.
1920
RICHARDS
v.
DAVIES.
—

Solicitors for the plaintiff: *Hopgood, Mills, Steele & Co., for Gabb, Price and Fisher, Abergavenny.*

Solicitors for the defendant: *Smythe & Brettell, for Gardners, Heywood & Grey, Abergavenny.*

(1) 5 C. B. 533, 536.

H. L. F.

EVE J.

HUDSTON *v.* VINEY.

1920

Oct. 15, 19. *Vendor and Purchaser—Title—Registration—Mortgage—Priority—Legal Estate—Prior equitable Charge—Purchaser for Value without Notice—Absence of Inquiry—Omission to require Production of Deeds—Negligence.*

In 1908 the legal mortgagees of a freehold house accepted as sufficient root of title a principal deed of 1888 by which the property was conveyed in fee to their mortgagor free from incumbrances, and they did not call for an abstract of title or make any further investigations. The deed of 1888 referred to an earlier deed of 1883 which contained restrictive covenants applicable to the property mortgaged, but the mortgagees made no inquiry as to the custody or contents of this earlier deed, nor was its production insisted on. It had been in the mortgagor's possession continuously from 1901, together with the other title deeds of the property. The mortgagor had given an equitable charge on the same property in 1889 to the trustees of his marriage settlement, of whom he was one:—

Held, that although there had been some negligence by the mortgagees in not requiring an abstract and not further investigating the mortgagor's title, and also in not inquiring as to the deed of 1883, yet the sum of their carelessness did not amount to such gross negligence as would disentitle them, or a purchaser from them, to the protection of the legal estate, as against the holders of the prior equitable charge.

Oliver v. Hinton [1899] 2 Ch. 264 applied and distinguished.

The "gross negligence" in cases of this description which would render it unjust to deprive a prior incumbrancer of his priority meant, at least, carelessness of so aggravated a nature as to amount to the neglect of precautions which an ordinary reasonable man would have observed, and to indicate an attitude of mental indifference to obvious risks.

ADJOURNED SUMMONS.

This was an appeal from a decision of the Registrar of the Land Registry who had overruled the objections put forward by the applicants against the registration of the respondent's title to a freehold house. The question of title arose under peculiar circumstances.

The applicants, Samuel Herbert Hudston, and Winifred Mary Hudston, were the present trustees of a settlement dated April 23, 1879, made on the marriage of Henry Hudston and Jenny Jones Hudston.

By an indenture made on July 13, 1883, the property known as 21 Daleham Gardens, Hampstead, was conveyed in fee simple by Sir Spencer Maryon Maryon Wilson to the

Rev. Doctor Joseph Parker, and it contained certain restrictive covenants. By an indenture dated June 22, 1888, Joseph Parker in consideration of 4000*l.*, conveyed the same property to Henry Hudston in fee simple, free from incumbrances. This conveyance was expressed to be made subject to the covenants in the deed of July 13, 1883. By an indenture dated July 16, 1888, Henry Hudston mortgaged the said property to Thomas Rutt, Walter Barnard, and Fanny Elizabeth Phillips, to secure 2500*l.* and interest. By a memorandum of charge dated November 4, 1889, Henry Hudston declared that the title deeds to his estate at 21 Daleham Gardens (then in mortgage to T. Rutt, W. Barnard, and F. E. Phillips to secure 2500*l.*), should, subject to the said mortgage, be a security to the trustees under the settlement of April 23, 1879, for securing to them the due repayment by him, his heirs, executors, or administrators, of all and every sum and sums of money which were then or should be at any time thereafter due or owing by him, his executors, or administrators, to the aforesaid trustees, their heirs, executors, administrators, or assigns, but it was understood that the total amounts to be ultimately recovered by this memorandum should not exceed 1500*l.* And by the same memorandum Henry Hudston authorized T. Rutt, W. Barnard, and F. E. Phillips, after payment of the said 2500*l.* and interest, to retain the said title deeds until payment to the said trustees, their heirs, executors, administrators, or assigns, of whatever sum or sums of money should be found due and owing, or that might or should become due and owing by him to the said trustees, their heirs, executors, administrators, or assigns, and the said Henry Hudston thereby undertook whenever thereunto required at his own expense to execute to the said trustees a mortgage with a power of sale subject as aforesaid for the better securing the amount then or thereafter owing by him to the said trustees, their heirs, executors, administrators, or assigns (not exceeding in the whole 1500*l.*). At all material times Henry Hudston was one of the trustees of the said marriage settlement, but not himself a beneficiary thereunder.

EVE J.
1920
HUDSTON
v.
VINEY.
—

EVE J. On March 16, 1901, the mortgage of July 16, 1888, was repaid, the property was reconveyed to H. Hudston, and the deeds and documents of title relating thereto were handed to H. Hudston by the mortgagees.

1920
HUDSTON
v.
VINEY.
—

On July 5, 1902, H. Hudston abstracted the indenture of June 22, 1888, from the bundle of title deeds then in his custody, and deposited the same with the London and Westminster Bank by way of security for advances, accompanied by a memorandum of July 5, 1902. In 1908, in pursuance of an undertaking contained in the memorandum of deposit, H. Hudston executed a legal mortgage to the Bank of the property comprised in the conveyance of June 22, 1888, which mortgage was dated August 19, 1908, and was to secure an overdraft of 4225*l.* 14*s.* 5*d.* The Bank accepted the conveyance of 1888 as sufficient root of title and made no further inquiry as to prior incumbrances attaching to the property, or any further investigation of title.

On October 14, 1908, H. Hudston executed an assignment (inter alia) of the property subject to the mortgage of August 19, 1908, to his wife Jenny Hudston, and H. J. Hudston and W. M. Hudston, the beneficiaries under his marriage settlement, and notice of this assignment was given to the Bank.

It appeared in evidence that at this time H. Hudston was 84 years old and in feeble health, and a friend of the family was asked to look into his affairs and go through his papers so as to extricate him from his financial difficulties. In the course of that investigation there were found in his deed box certain deeds relating to this house including the deed of July 13, 1883, the deed of mortgage to Rutt and others, with the reconveyance indorsed thereon, and the memorandum of charge of November 4, 1889.

On August 24, 1909, the Bank received notice of the claim of the trustees of the settlement to their prior charge of November 4, 1889, to secure 1500*l.* H. Hudston died in 1916. On June 17, 1919, the London County Westminster and Parr's Bank claiming to be in possession as mortgagees by the deed of August 19, 1908, contracted to sell to the respondent the house in question in exercise of their power of

sale. The applicants had lodged a "caution" at the Land Registry against the sale. On July 12, 1919, the Bank conveyed 21 Daleham Gardens to the respondent, Emily Viney, in fee for 2250*l*. On her claiming to be registered at the Land Registry as proprietor of the house in fee simple under this conveyance, objection was raised by the present applicants on the ground that H. Hudston, the mortgagor, had created an equitable charge on November 4, 1889, in favour of the trustees of his marriage settlement, accompanied by a deposit of title deeds, and that if proper inquiry had been made into the title by the Bank this would have been found out. The title shown to the respondent by the Bank consisted of the conveyance of June 22, 1888, from Joseph Parker, the mortgage in fee of August 19, 1908, and certain other documents and proceedings whereby the mortgage became vested in the London County Westminster and Parr's Bank. All these documents were in the custody of and produced by the vendor. The Registrar held that the omission by the applicant for registration to inquire for the earlier deed of 1883 was not negligence of the "gross" character required to deprive her of the protection of the legal estate, and he held that the objections failed.

EVE J.
1920
HUDSTON
v.
VINEY.
—

Russell Gilbert for the applicants. We claim under the equitable memorandum of charge of November 4, 1889, made some twenty years earlier than the legal mortgage to the Bank. The question must be considered as at the time when the Bank took their mortgage, as the respondent stands in the shoes of the Bank. There was no inquiry by the Bank as to the title or request for an abstract. If they had inquired as to the custody or contents of the deed of July 13, 1883, and insisted on its production, the existence of the prior equitable charge would have come to light. They were put upon inquiry by the reference to this deed of 1883 in the deed of June 22, 1888. Their neglect to do so amounts to such negligence as disentitles them and the present possessor of the legal estate in this property to protection and makes it unjust to prefer her to the prior equitable mortgagee:

EVE J. *Berwick & Co. v. Price* (1) and *Oliver v. Hinton* (2), where
 1920 gross negligence was established. H. Hudston must be taken
 HUDSTON to have had the title deeds of the property in his possession
 v. as a trustee of the marriage settlement. Notice of a deed
 VINEY. is notice "not only of its contents but of the facts, the
 knowledge of which the insisting on its production would
 have necessarily led to": *Peto v. Hammond*. (3)

Baden Fuller for the respondent. The decision of the Registrar was right and there is no prima facie case for reversing it. If the Bank had made the inquiry suggested it does not follow that they would have discovered 'the equitable charge. It is not proved that H. Hudston had the deeds in his possession as one of the trustees of the settlement, nor can it be inferred. The Court will protect the purchaser for value without notice of any prior incumbrance as against a prior equitable mortgagee. There has been no such wilful or gross negligence on the part of the Bank, or of the respondent within the cases to render it inequitable that her title should prevail: *Pilcher v. Rawlins* (4); *Ratcliffe v. Barnard*. (5)

Oliver v. Hinton (2) was a strong case where gross negligence was clearly proved, and is therefore distinguishable on the facts. Here, the Bank relied upon a conveyance in fee simple in 1888, and were content with a twenty years' title; there was no obligation to go further, and having obtained the legal estate in 1908 they remained in undisturbed possession up to the sale to the respondent. The applicants have stood by since 1909 and have themselves been guilty of laches: *Walker v. Linom*. (6)

Russell Gilbert in reply.

EVE J. In July, 1919, the London County Westminster and Parr's Bank contracted to sell to the respondent on this appeal the freehold house, No. 21 Daleham Gardens, Hampstead. The Bank purported to sell the property as legal mortgagees under a deed dated August 19, 1908, free from

(1) [1905] 1 Ch. 632.

(2) [1899] 2 Ch. 264.

(3) (1861) 30 Beav. 495.

(4) (1872) L. R. 7 Ch. 259.

(5) (1871) L. R. 6 Ch. 652.

(6) [1907] 2 Ch. 104.

incumbrances. In due course the purchaser having paid the purchase money and obtained her conveyance sought to have herself registered at the Land Registry as owner in fee free from incumbrances, but objections were raised on behalf of the present appellants to such registration on the ground that the Bank's legal title, by reason of the matters stated in the objections, was postponed to a prior equitable charge in favour of the trustees of the marriage settlement of the mortgagor under which the appellants claim to be trustees and beneficiaries. The objections were overruled by the Registrar, and on this appeal, which has been brought from his decision, the question I have to determine is whether in the circumstances the Bank's legal title which, *prima facie*, would prevail over the prior equitable charge, ought so to prevail, or be postponed. It is a mixed question of law and fact, and it is therefore necessary to state the facts as I find them disclosed in the evidence. [His Lordship stated the facts and deeds, and continued:] *Prima facie*, as I have already said, the Bank have priority over the equitable security notwithstanding that the latter was prior in date by some twenty years to the legal mortgage. But that priority is undoubtedly capable of being lost if the conduct of the Bank in the transaction was such as to make it unjust that they should be allowed to retain their priority and thereby deprive the owners of the equitable charge of the advantage to be derived from its earlier execution.

It is difficult to lay down any general rule, or to state any general principle, applicable to all these cases. Before the judgment of the Court of Appeal in *Oliver v. Hinton* (1) it was undoubtedly more difficult to displace the owner of the legal estate in favour of a prior equitable charge than it has been since that decision. In the earlier cases the opinion had been expressed by both James and Mellish L.JJ. in *Ratcliffe v. Barnard* (2) that in order to displace the owner of the legal estate, the Court must find either that he had been guilty of fraud in the transaction under which he acquired the legal estate, or that he had been guilty of such wilful

EVE J.

1920

HUDSTON

v.

VINEY.

(1) [1899] 2 Ch. 264.

(2) L. R. 6 Ch. 654.

EVE J. negligence as would lead the Court to the conclusion that he
1920 was an accomplice in the fraud; but in *Oliver v. Hinton* (1)
HUDSTON the Court of Appeal expressed the view that this statement
of the law went too far in favour of the legal owner, and
VINEY. Lindley M.R. substituted a rule expressed in these words:
“To deprive a purchaser for value without notice of a prior
incumbrance of the protection of the legal estate it is not,
in my opinion, essential that he should have been guilty of
fraud; it is sufficient that he has been guilty of such gross
negligence as would render it unjust to deprive the prior
incumbrancer of his priority.” That language undoubtedly
qualifies what had been said in the earlier cases, but it still
leaves open in each case the question whether the degree of
negligence has been such as to destroy the protection of the
legal estate, for I apprehend that by the words “gross negli-
gence” something more is meant than mere carelessness;
it must at least be carelessness of so aggravated a nature
as to amount to the neglect of precautions which the ordi-
narily reasonable man would have observed and to indicate
an attitude of mental indifference to obvious risks. If there
are no circumstances suggestive of risk I doubt whether
the neglect to make inquiries by which the existence of such
risk might have been disclosed would as a general rule
amount to “gross negligence.”

The facts in *Oliver v. Hinton* (1) were, I think, sufficient
to establish gross negligence on the part of the purchaser
under both the heads I have mentioned. She was buying
from a solicitor who stated that the title deeds were in his
possession and when asked whether he was going to hand
them to the purchaser answered that he could not do so,
as they related also to other property.

His statement and answer were accepted; he was never
asked to produce the deeds, nor was the delivery of any
abstract of title required. Had he been asked to produce
the deeds he could not have done so, as he had already
deposited them with some one else as security for advances
made. The purchaser's adviser not only neglected the

(1) [1899] 2 Ch. 264, 274.

precaution which any reasonable man would have taken of asking for production of the deeds, but, as it seems to me, he by abstaining from so doing showed himself indifferent to the obvious risk that the vendor's statements as to the possession and contents of the deeds were untrue.

The facts of that case differ very widely from those of the present one. Here the Bank had for several years held the deed by which the property was vested in H. Hudston. It is true that they had not required any abstract to be furnished nor had they made any investigation into the title prior or subsequent to that deed, they were content to accept the title disclosed by the deed. Upon this the first question which arises is this, Were the Bank, holding the principal deed relating to the property—a deed, be it observed, dated some years previously—guilty of gross negligence in abstaining from requiring an abstract, and from making any further investigation into the mortgagor's title?

I do not think they were. That there was some negligence in the transaction cannot, I think, be gainsaid, but I am not prepared to hold that the abstention was such as to amount to gross negligence, or to conduct of such a nature as to render it unjust that they should retain the protection of the legal estate. The deed which they had held for a considerable time vested the property in the mortgagor, it was one which a reasonable man might well have accepted as a good root of title, and nothing had transpired in the period during which the Bank had been in possession of the deed to give rise to any suspicion as to the existence of any interest in the property beyond that of the mortgagor and the Bank. In these circumstances I do not think it possible to hold that the Bank showed themselves indifferent to any obvious risk. But it is said that there is another factor here which cannot be overlooked in estimating the degree of the Bank's negligence, and which really converts that negligence into gross negligence. By the deed of June 22, 1888, the property was conveyed to the mortgagor subject to certain restrictive covenants contained in an earlier deed of July 13, 1883. There is no undertaking for the safe custody or covenant for

EVE J.

1920

HUDSTON

v.
VINEY.

EVE J. the production of that deed of 1883 in the deed of 1888, and
1920 the inevitable conclusion therefore is that the deed of 1883
HUDSTON relates solely to this particular property. From this it follows
v. that the deed of 1883 ought to have been in the mortgagor's
VINEY. possession, and the Bank, it is argued, ought to have required
— its production in order to ascertain what the restrictive
covenants were, and to have insisted on its delivery to
them as part of their security. There is a good deal of
force in that contention. I think there was some further
negligence on the part of the Bank in not making some
inquiry as to the contents and whereabouts of the deed
of 1883. But does this additional negligence amount in
itself, or when coupled with the other omissions does the
sum of their carelessness amount to "gross negligence"?
I do not think so. It is said that the nature of the
restrictions imposed on the property was well known. It
may be so, but I do not attach any importance to that
fact. What I do attach importance to is the fact that the
mortgagor had the deed of 1883 in his possession continuously
from 1901, and on the facts in evidence there is not the smallest
reason to doubt that had the Bank asked for inspection and
had they insisted on delivery to them of this deed it would
at once have been produced and handed over to them. It
may be that in not requiring production and delivery the
Bank did something less than the reasonable man would
have done, and in a sense they may have shown themselves
indifferent to the nature of the restrictions imposed on the
property, but I cannot see that the absence of any inquiry
for the deed of 1883 proves them indifferent to any obvious
risk of its having been deposited with any one else, inasmuch
as it could not be of any possible value apart from the deed
of 1888.

On the whole I think that I should be going further than
I am justified in doing by the judgments in *Oliver v.*
Hinton (1) were I to hold the Bank guilty of gross negligence
either in 1902 or 1908. The case is a peculiar and almost
unique one, but looking at all the circumstances, I think I

ought to give the purchaser the protection of the legal estate which she has acquired, and accordingly I dismiss the appeal, and direct the registration to be proceeded with. The appellants must pay the costs of the appeal.

EVE J.
1920
HUDSTON
v.
VINEY.

Solicitors : *Taylor, Hoare & Jelf, for Fraser & Son, Nottingham ; Whitfield, Byrne & Dean.*

G. M.

In re FERDINAND, EX-TSAR OF BULGARIA.

C. A.

War—Enemy Property—Confiscation—Belligerent Sovereign at War with England—Movable Property in England—Choses in Action—Absence of Distinction between Legal and Equitable Interests—Crown's Right of Forfeiture—Abandonment or cesser of Right by Desuetude—Statutory Supersession—Effect of Trading with the Enemy Acts, 1914–16.

1920
May 17, 18,
19, 20;
June 2;
July 30.

Under the common law of England the Crown has always had and, subject to the effect of the Trading with the Enemy Acts, 1914–16, still has the right to seize and forfeit private property, including choses in action and equitable interests therein, found in this Kingdom belonging to subjects of an enemy State.

That right has not been abandoned by desuetude. The powers conferred by the Trading with the Enemy Acts, however, are so inconsistent with the exercise of the common law right of forfeiture that that right must be treated as being thereby, at least temporarily, superseded.

In order to complete the title of the Crown to property so seized an inquisition of office must be held before the conclusion of peace.

Where enemy property was so seized during war, but no inquisition was held until after the conclusion of an armistice, whether the forfeiture was thereby invalidated—*Quære*.

Wolff v. Oxholm (1817) 6 M. & S. 92 distinguished.

Decisions of Eve J. and P. O. Lawrence J. reversed.

APPEALS from two orders made by Eve J. and P. O. Lawrence J. respectively.

The appellant, Ferdinand, Ex-Tsar of Bulgaria, was not a party to the proceedings in the Courts below but had, on November 10, 1919, obtained an order from the Court of Appeal giving him leave to appeal from both orders.

By the orders appealed from certain stocks and securities formerly belonging to the appellant were vested in the Solicitor to the Treasury as trustee for H.M. the King.

C. A. Some of these stocks stood in the appellant's name—the
1920 subject of the order of Eve J. Others stood in the names
FERDINAND, of trustees for the appellant—the subject of the order of
EX-TSAR, P. O. Lawrence J.
OF

BULGARIA, The nationality of the appellant was Bulgarian. In 1887
In re. he became Prince of Bulgaria and thereupon became a
Bulgarian national. In 1908 the independence of Bulgaria
from Turkey was declared, and the appellant became Tsar.
He was a constitutional sovereign and not an autocrat. He
was not an absolute monarch or despot but governed through
ministers chosen out of the ranks of the National Assembly
or Sobranje. An annual sum was paid to him by way of
remuneration.

In an affidavit filed by the appellant he stated as follows :
“The respective Princes of Bulgaria and Tsars of Bulgaria
for the time being have never been, during their reign, nor
was I, absolute monarch or despot. The Prince or Tsar
has always governed, and still governs, as a constitutional
monarch, through Ministers who are chosen out of the
ranks of the national Parliament, the members of which
are elected by the Bulgarian nation. The Prince or Tsar
has never had control or administration of the public
revenue or public property of the principedom or tsardom of
Bulgaria, which are, and always have been, administered by
his Ministers. The Prince or Tsar has never had power,
and I never had power, to apply, and never did apply, the
public revenue, or other public property of Bulgaria, or any
part thereof, to my private use, or for my private purposes.
The only remuneration I have ever received out of Bulgarian
public money or property in respect of my provision as
Sovereign was an annual sum which I could, by the law of
Bulgaria, apply in any manner I thought fit. Such annual
sum was my private property.”

The stocks and securities in question did not represent
properties arising from the public revenues of Bulgaria, but
property which originally belonged to the appellant's mother,
Princess Clementine, a daughter of Louis Philippe. The
indicia of title to this property had for many years before

the war been deposited with his bankers, Coutts & Co. It was his absolute private property. He was not then a sovereign in a legal and political sense, and the property was never national property.

On October 15, 1915, war broke out between Bulgaria and the United Kingdom.

On September 29, 1918, an armistice was declared with Bulgaria.

On October 3, 1918, the appellant abdicated the throne of Bulgaria.

Down to that time nothing had been done with regard to his property which was in England, except as to certain bearer bonds.

On June 27, 1919, the Crown issued a commission under the Great Seal with regard to his property, by which the Commissioners were required to inquire whether he was at the outbreak of war beneficially entitled to certain bearer bonds and registered stock and to make a return. The Commission dealt with three schedules of property: Sch. A. as to bearer bonds (not before the Court on the present occasion); Sch. B. securities registered in names of nominees; and Sch. C. securities registered in his own name.

On July 10, 1919, the inquisition was held and the jury found that the stocks and securities were at the outbreak of war the property of the appellant and were forfeited to the Crown,

On July 28, 1919, the Attorney-General presented a petition under the Trustee Act, 1893, with regard to the securities which stood in the name of the appellant, claiming that these securities had become vested in the Crown on the outbreak of the war, and asking that a new trustee should be appointed and a vesting order made. No one was served with this petition. It was heard before Eve J. on July 30, 1919, who made the first order appealed from, declaring that the title was in the Crown, and appointing the Treasury Solicitor as trustee, and vesting the property in him. The order did not extend to the securities vested in other persons as trustees for the appellant.

C. A.

1920

FERDINAND,
EX-TSAR

OF

BULGARIA,
In re.

C. A. On August 9, 1919, the Attorney-General presented a
 1920 further petition, to which the trustees were made respon-
 FERDINAND, dents, with regard to the latter securities. That petition
 EX-TSAR came before P. O. Lawrence J. on August 13, 1919.
 OF
 BULGARIA, Following the decision of Eve J., he made the second order
 In re. appealed from, declaring that the title to the property was
 — in the Crown and appointing the Treasury Solicitor as a
 new trustee in place of the old trustees and making a vesting
 order. As to this order there was a question whether the
 Court could make a vesting order in the case of equitable
 interests.

On November 10, 1919, the Court of Appeal gave the appellant leave to appeal from both orders.

Both Eve J. and P. O. Lawrence J. held that by virtue of the outbreak of war the securities with which they were dealing respectively had become forfeited to and vested in the Crown so completely that the persons in whose names they stood had become trustees for the Crown, and that thereupon the provisions of the Trustee Act, 1893, applied, and they exercised the jurisdiction thereby conferred upon them and made the usual order giving the new trustee the right to call for the legal title to the securities.

Transfers of all the securities had been made.

Upjohn K.C., Ashworth James and F. E. Farrer for the appellant.

I. No question of maritime property arises here. The mere outbreak of war never did and does not now operate ipso facto a forfeiture of the movable property of an alien lawfully within the United Kingdom at the time when the outbreak of war turns him into an enemy.

II. An enemy sovereign at all events as to his private movable property is in no worse position than an enemy subject.

III. The stocks the subject of these appeals are choses in action. Neither the outbreak of war, nor its continuance, ever gave or now gives the Crown even potential power to forfeit enemy choses in action.

IV. If the Crown ever had the power to forfeit choses in action, that power was lost by abandonment at least 100 years ago.

C. A.

1920

V. If not so lost by abandonment the power was by virtue of the Trading with the Enemy Acts abandoned for the purpose of the late war.

FERDINAND,
EX-TSAR
OF
BULGARIA,
In re.

VI. In any event the armistice suspended hostilities. This took place not only before the Crown had actually seized, but also before the Commission, and consequently before the inquisition finding the stocks to be the appellant's property. Hostilities being suspended by the armistice, the power of the Crown to hold an inquisition and to seize as on a forfeiture was and still is suspended. Should the war die in its sleep without resumption of hostilities, the power to forfeit now suspended will have been for ever lost.

VII. The power to forfeit never applied and does not apply to choses in action vested legally in trustees though upon trust in equity for the enemy.

As to the first point it is stated no doubt in Hale's *Pleas of the Crown*, ed. 1800, p. 94, that "by the law of *England* debts and goods found in this realm belonging to alien enemies belong to the King, and may be seized by him," but the authorities there relied upon do not support the proposition: see per Lord Ellenborough in *Wolff v. Oxholm*. (1) The Year Book 7 Edw. 4 has nothing to do with it. The Year Book 19 Edw. 4 is at most a "peradventure" by Brian that the King should have the debt. The proposition is questioned in Rolle's Abridgment, *Alien*, p. 195.

In *Furtado v. Rodgers* (2) the point did not arise for decision, but the judgment of Lord Alvanley contains the following dictum: "With respect to the argument insisted upon by way of answer to the public inconvenience likely to arise from permitting such contracts to be enforced, viz., that all contracts made with an enemy enure to the benefit of the King during the war, and that he may enforce payment of any debt due to an alien enemy from any of his

(1) 6 M. & S. 92.

(2) (1802) 3 Bos. & P. 191, 200.

C. A. subjects, we think it is not entitled to much weight. Such
 1920 a course of proceeding never has been adopted; nor is it
 FERDINAND, very probable that it ever will be adopted, as well from the
 Ex-Tsar difficulties attending it, as the disinclination to put in force
 OF such a prerogative."
 BULGARIA,
 In re.

[LORD STERNDALÉ M.R. That does not go to the right of property but to the right to enforce a contract. Securities of this kind come under the head of goods for the purposes of prize.]

We rely upon the judgment of Lord Ellenborough in *Wolff v. Oxholm*. (1)

The Acts 34 Geo. 3, c. 9, and 34 Geo. 3, c. 79, to which he there refers, are absolutely inconsistent with the case made by the Crown that debts due to alien enemies are on the outbreak of war absolutely forfeit to the Crown. The preamble to 34 Geo. 3, c. 9, contains a legislative statement that direct and violent seizure, etc., of property by a belligerent is an unjust measure and destructive of all commercial credit; see also 34 Geo. 3, c. 79, ss. 5, 11, 12, 20, 29.

[WARRINGTON L.J. referred to s. 31 of that Act.]

The mere existence of a war does not operate as a forfeiture.

Wolff v. Oxholm (1) has been approved of in *Phillips v. Eyre* (2), where it is stated that that case "was the case of an act of confiscation as prize of a debt by a foreign government, contrary to the law of nations."

As to the modern law see *The Roumanian* (3), where Lord Parker says: "Whatever may have been the case in earlier times, no one will now contend that the private property of enemy subjects found within the realm at the commencement of a war can be seized and appropriated by the Crown." And in *Daimler Co. v. Continental Tyre and Rubber Co.* (4) Lord Parker says: "In early days the King's prerogative probably extended to seizing enemy property on land as well as on sea. As to property on land, the prerogative has long fallen into disuse. Subject to any

(1) 6 M. & S. 92.

(2) (1870) L. R. 6 Q. B. 1, 27.

(3) [1916] 1 A. C. 124, 135.

(4) [1916] 2 A. C. 307, 347.

legislation to the contrary or anything to the contrary contained in the treaty of peace when peace comes, enemy property in this country will be restored to its owners after the war just as property in enemy countries belonging to His Majesty's subjects will or ought to be restored to them after the war."

C. A.

1920

FERDINAND,
EX-TSAR
OF
BULGARIA,
In re.

It is submitted that not only is there no vesting of enemy property in the Crown on the outbreak of war, but there is no right of seizure. In *Stevenson v. Cartonnagen-Industrie* (1) Lord Parker's observations in the *Daimler Case* (2) were converted into a decision. The Trading with the Enemy Amendment Act, 1914, provides a destination for enemy property which is inconsistent with the view that the Crown can seize it. The Act proceeds on the assumption that the property of enemy aliens should not be forfeited but preserved for them until the end of the war.

The appeal to the House of Lords in *Stevenson's Case* (3) had reference only to the question of interest on the enemy partner's share of the assets of the partnership. Lord Finlay there said: "It is not the law of this country that the property of enemy subjects is confiscated." That statement is absolutely inconsistent with the contention of the Crown.

Mr. Westlake in *International Law*, 2nd ed., Part II., War, p. 47, says: "My own conclusion is that the time is now fully ripe when a British Court should not lag behind the position taken by governments, but should boldly follow Lord Ellenborough" in *Wolff v. Oxholm*. (4) We invite the Court to do so in this case.

It is submitted that in *Stevenson's Case* (5) the House of Lords have gone the whole way.

[They also referred on this point to *The Victoria Nyanza* (6), and note in Dana's edition of *Wheaton's International Law*, 8th ed., 1866, p. 451, and to *In re De Keyser's Royal Hotel* (7) as to the prerogative being merged in the statute.]

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|-----------------------------------|--------------------------------------|
| (1) [1917] 1 K. B. 842, 848, 849, | (4) 6 M. & S. 92. |
| 850. | (5) [1918] A. C. 239, 245, 248, 249, |
| (2) [1916] 2 A. C. 307, 347. | 253, 256. |
| (3) [1918] A. C. 239, 244. | (6) [1919] P. 83, 85. |
| | (7) [1919] 2 Ch. 197, 216. |

C. A. The Trading with the Enemy (Amendment) Act, 1914
 1920 (5 & 6 Geo. 5, c. 12), the Trading with the Enemy (Amendment)
 FERDINAND, Act, 1915 (5 & 6 Geo. 5, c. 79), and the Trading with the
 EX-TSAR Enemy (Amendment) Act, 1916 (5 & 6 Geo. 5, c. 105), are
 OF of vital importance on the question as to property remaining
 BULGARIA, in an enemy.
 In re.

The preamble to the Act of 1914 recites that it is expedient to make further provision for preventing the payment of money to persons resident or carrying on business in any country with which His Majesty is for the time being at war in contravention of the law relating to trading with the enemy and for preserving with a view to arrangements to be made at the conclusion of peace, such money and certain other property belonging to enemies. The Act then proceeds (s. 1) to constitute a custodian of enemy property, to provide (s. 2) for the payment to him of dividends, etc., payable to enemy subjects, and directs (s. 3) trustees for enemies to notify the fact to the custodian. This is a plain assumption that the property remains in the enemy subjects. By s. 4 power is given to the Court to vest enemy property in the custodian. That again is an assumption that until a vesting order is made the property remains in the enemy, and is quite inconsistent with the property being forfeited to the Crown. By s. 14, sub-s. 4, nothing in the Act is to be construed as limiting the power of His Majesty by proclamation to prohibit any transaction which is not prohibited by the Act, or by licence to permit any transaction which is so prohibited.

By the Act of 1915, s. 2, the provisions of the Act of 1914 were extended to bank balances and debts due to enemies.

By the Act of 1916, s. 4, the Board of Trade are empowered to vest enemy property in the custodian. Under this section the Board of Trade on November 19, 1919, purported to make an order in the present case vesting the property in question in the custodian in the event of the forfeiture to the Crown being held to be invalid.

[YOUNGER L.J. You say that in this case the Crown is claiming by a title paramount to these Acts and that

their relevance is to show that there is no such title paramount ?]

Yes. We contend that no title has accrued to the Crown by virtue of the war.

As to the fifth point we submit that the Crown, by assenting to the passing of the Trading with the Enemy Acts, has abandoned its right of forfeiture at all events for the purposes of the late war. The machinery of those Acts cannot exist side by side with the right of the Crown to seize. The right claimed by the Crown is inconsistent with the provisions in the Acts as to arrangements being made for the return of enemy property on the conclusion of peace: see *Stevenson's Case* (1); Wheaton's International Law, Phillipson's edition, 5th ed., p. 419; Oppenheim's International Law, 2nd ed., War and Neutrality, p. 139, § 102; Hall's International Law, p. 459, § 144.

[WARRINGTON L.J. referred to *The Johanna Emilie*. (2)]

Upon the question whether there is any difference between the position of an ordinary enemy and the appellant, he was not a sovereign in the sense in which that term is regarded in International Law: see Grotius *De Jure Belli ac Pacis*, Lib. 1, c. 3, § 7; he was only a limited monarch: see Austin's Jurisprudence, 2nd ed., pp. 196-7, 239. On the evidence it is plain that the appellant was not a sovereign in the legal and political sense. His property was never in Bulgaria and the case falls to be decided on the same ground as one relating to property of any other alien found in this country at the beginning of the war.

Further, no step was taken by the Crown to seize the property until 1919 after the armistice had been proclaimed, and there was then no right to commit the hostile act of seizure.

[LORD STERNDALÉ M.R. suggested that that point should be reserved for the present.]

Sir Gordon Hewart A.-G., Austen-Cartmell, Branson and Gavin T. Simonds for the Crown. In this case a belligerent

C. A.
1920
FERDINAND,
EX-TSAR
OF
BULGARIA,
In re.
—

(1) [1917] 1 K. B. 842, 852; [1918] A. C. 239, 244, 245.

(2) (1854) Spink's Prize Cas. 14.

C. A.
1920
FERDINAND,
EX-TSAR
OF
BULGARIA,
In re.

sovereign comes into an English Court and asserts that his property has been wrongfully seized. The case goes beyond any other that has been decided. An alien enemy, unless he be within the realm by licence of the King, cannot sue in the King's Courts : *Porter v. Freudenberg*. (1) The appellant however has been given leave to appeal against the orders.

We do not contend that the outbreak of war operates as a cause of forfeiture.

1. As to whether the right to seize enemy property on land on the outbreak of war exists.

What is the law to be administered in this Court ?

In *West Rand Central Gold Mining Co. v. The King* (2) Lord Alverstone C.J. said that municipal Courts "exist for the purpose of determining and enforcing legal obligations, not for the purpose of dividing them into classes, and saying that some of them although legally binding, ought not to be enforced." And later on : "It is quite true that whatever has received the common consent of civilized nations must have received the assent of our country, and that to which we have assented along with other nations in general may properly be called international law, and as such will be acknowledged and applied by our municipal tribunals when legitimate occasion arises for those tribunals to decide questions to which doctrines of international law may be relevant. But any doctrine so invoked must be one really accepted as binding between nations, and the international law sought to be applied must, like anything else, be proved by satisfactory evidence, which must show either that the particular proposition put forward has been recognized and acted upon by our own country, or that it is of such a nature, and has been so widely and generally accepted, that it can hardly be supposed that any civilized State would repudiate it. The mere opinions of jurists, however eminent or learned, that it ought to be so recognized, are not in themselves sufficient. They must have received the express sanction of international agreement, or gradually have grown to be part of international law by their frequent

(1) [1915] 1 K. B. 857.

(2) [1905] 2 K. B. 391, 401, 406.

practical recognition in dealings between various nations." The appellant's counsel have satisfied none of those alternatives. It is said that the right has actually been taken away by cesser of user. As to judicial authority the only two cases which suggest that the exemption of private enemy property from seizure has become part of the law of nations are *Wolff v. Oxholm* (1) and *Furtado v. Rogers*. (2)

C. A.
1920
FERDINAND,
EX-TSAR
OF
BULGARIA,
In re.

But those cases must be taken to have been overruled by *Porter v. Freudenberg*. (3) In that case Lord Reading C.J. said: "Whether the right of the Sovereign to confiscate any of the alien enemies' goods or debts in this realm was ever exercised or not (see *Wolff v. Oxholm* (1), per Lord Ellenborough), there can be no doubt about the existence of the right: see *Attorney-General v. Weeden*. (4)" That answers the fundamental question in this case: see also *Rex v. Williamson* (5); *Land v. Lord North* (6); *Antoine v. Morshead* (7); *The Johanna Emilie* (8); Wheaton's International Law, 8th ed., edited by Dana, p. 480n.

[LORD STERNDAL M.R. The only case that raises any difficulty is *The Ooster Eems*. (9)]

The appellant's first contention is therefore wrong; the true proposition is that enemy property on land in this country may be seized after the outbreak of war. As to the existence of that right up to the end of the eighteenth century there is ample authority. Since then, it is said, there has been a cesser of the right. If that is so, the Courts may have to come to the conclusion that the Crown has considered it inexpedient to exercise the right as being likely to provoke a similar course by the enemy towards our own people. The Crown may have chosen not to exercise the right against private individuals but to put it in force against this particular individual as being the author of the war. It is suggested that there can be no sovereign unless he is a despot. That is not correct. But even if it be it does not affect

(1) 6 M. & S. 92.

(2) 3 Bos. & P. 191.

(3) [1915] 1 K. B. 857, 869.

(4) (1699) Parker, 267.

(5) (1672) Freeman, K. B. 39.

(6) (1785) 4 Doug. 266.

(7) (1815) 6 Taunt. 237.

(8) Spink's Priz. Cas. 14.

(9) (1784) 1 C. Rob. 284n.

C. A. our present argument. We do not say that a different rule
 1920 applies to the appellant because he occupies a special
 FERDINAND, position, but merely that the right exists and that there is
 EX-TSAR no reason for extending to him the exemption from it which
 OF has been accorded to other persons. There is no reason in
 BULGARIA, the present case for relaxing the rigour of the rule in favour
 In re. of the appellant.

[During the course of the argument counsel for the Crown produced various instances of Exchequer Special Commissions issued from 1693 to 1812 under which inquisitions were found forfeiting to the Crown private enemy property, including choses in action, and they particularly relied upon *Attorney-General v. Weeden*. (1)]

Further it is contended on behalf of the appellant that the contention of the Crown is inconsistent with the Trading with the Enemy Acts. That argument is based on a misconception. The first of the Acts has the limited object of imposing penalties for trading with the enemy. That was followed by the Amendment Act of 1914, which according to its preamble had the object of preserving enemy property with a view to arrangements to be made at the conclusion of peace, and which provided for the constitution of a guardian in whom the property might be vested by the Court alone; and then came the Amendment Act of 1916 which enabled the Board of Trade to make a vesting order. There is no inconsistency between that scheme of legislation and the claim now put forward by the Crown. It was important that a reservoir of money should be created which should be held until the end of the war and then applied as should be then determined. That is not inconsistent with the right of the Crown to forfeit.

It was further contended that nothing was done by the Crown until after the armistice had been proclaimed or during the time when it was lawful for a belligerent to seize. There is nothing material in the date of the armistice—September 29, 1918. Although the armistice was proclaimed on that date this country is not yet at peace with

(1) Parker, 267.

Bulgaria. Peace has not yet been signed, and there has been no Order in Council which says that war with Bulgaria has come to an end. The important date is the date of the Commission—June 27, 1919. The inquisition was held on July 10, the order of Eve J. was made on July 30 and that of P. O. Lawrence J. on August 13. What was therefore done was done, (1.) after the outbreak of war, (2.) before the declaration of peace, and (3.) after inquisition duly made. It is submitted therefore that in these circumstances there was power in the Crown to confiscate, and that that power has been properly exercised and this appeal ought to fail.

C. A.
1920
FERDINAND,
EX-TSAR
OF
BULGARIA,
In re.

Upjohn K.C. in reply. The result of the search among the records which is embodied in the collection of instances produced by the Crown goes to show that in no case has the right of the Crown been established. With regard to the instances coming down to the end of the eighteenth century the true view is that they were acts of reprisal. Reprisal is the right given to a belligerent to do some act altogether outside international law: Wheaton's International Law, 8th ed., p. 369, n. 151. The records merely show that the Crown was doing acts of that nature. The only instance of exercise of the right in the nineteenth century is referred to in Wheaton (Dana's Edition), p. 389, n. 156, where a despatch by Earl Russell to the British Consul at Richmond, Va., is cited: "Whatever may have been the abstract rule of the law of nations on this point in former times, the instances of its application in the manner contemplated by the act of the Confederate Congress, in modern and more civilized times, are so rare, and have been so generally condemned, that it may be said to have become obsolete." That was the view of the British Foreign Office at that time.

The position is clearly indicated in Westlake on International Law, Part II., 47, 48: "The time is now fully ripe when a British Court should not lag behind the position taken by Governments, but should boldly follow Lord Ellenborough." It is now well settled that according to the municipal law

C. A. of England there is no power in the Crown to confiscate.
 1920 That was admitted by the law officers in *In re Münster*. (1)
 FERDINAND, By the municipal law of England there is no right in the
 EX-TSAR Crown to forfeit the private property of an alien enemy :
 OF
 BULGARIA, *Wolff v. Oxholm* (2) ; *Fried Krupp v. Orconera Iron Ore*
In re. Co. (3) ; *Daimler Co. v. Continental Tyre and Rubber Co.* (4) ;
 — *Stevenson's Case.* (5) All those cases go to show that
 notwithstanding the existence of a state of war private
 property is respected in England. That is absolutely
 inconsistent with the right claimed in this case for the Crown.

With regard to the Trading with the Enemy Acts there
 are two views as to the effect of that legislation : (1.) On
 the true reading of *Wolff v. Oxholm* (2) there is no power in
 the Crown to seize and confiscate enemy property in this
 country, and it was therefore necessary to exercise control
 over it, partly for purposes of defence, and partly to preserve
 rights of ownership ; (2.) it being doubtful whether the right
 of forfeiture existed, and its exercise being difficult and
 expensive, the Legislature intended to supersede the right,
 if it existed, and to put in force a wiser policy whereby
 enemy property would be protected and dealt with after
 the conclusion of the war. It is impossible to reconcile the
 provisions of these Acts with the existence of a right in the
 Crown to forfeit.

Bankes L.J. in *Stevenson's Case* (6) said : " Enemy property
 is not confiscated by a declaration of war."

This legislation in cases to which it applies either shows
 that the prerogative right does not exist, or excludes its
 operation where it conflicts. The Acts are binding on the
 Crown save so far as the prerogative was expressly saved.

[LORD STERNDALÉ M.R. It was decided in the *De Keyser*
Case (7) that the prerogative right, if it existed, was limited
 so far as the subject is concerned, but that does not affect
 the right of the Crown to seize enemy property. What is
 there in this legislation to take away that right ?]

(1) [1920] 1 Ch. 268, 273, 274.

(2) 6 M. & S. 92.

(3) (1919) 88 L. J. (Ch.) 304.

(4) [1916] 2 A. C. 307.

(5) [1917] 1 K. B. 848 ; [1918]

A. C. 239.

(6) [1917] 1 K. B. 842, 854.

(7) [1919] 2 Ch. 197.

Before the war the appellant was the beneficial owner of these securities. His title can only be divested by proper proceedings recognized by the municipal law of England. By common law it was not divested by any right of seizure. There is now a code of legislation under which his title may be affected. The appellant though an enemy is entitled to rely on the municipal law of England which now rests upon the statutes to the exclusion of the old common law.

[Counsel then dealt with the point that the seizure had been invalidated because it was not completed by inquisition before the armistice.]

Admitting that there was an inchoate seizure the Crown was not entitled to proceed upon it after the armistice: *Attorney-General v. Weeden*. (1) There must be a complete title in the Crown which can only be based upon office found and filed of record, and that must take place in actual war. So long as the armistice is in force the Crown could not lawfully do any hostile act.

During an armistice all acts of hostility are unlawful either against the person or goods of an enemy. For every act of violence during a truce is contrary to the law of nations: Grotius de jure belli ac pacis, Lib. 3, cap. 21, §§ 1, 6, 8.

The completion of the seizure during the armistice was an act of hostility against the goods of an enemy and therefore invalid as contrary to the law of nations.

[On this point he also referred to Coke, 4th Inst., p. 156; Hale's Pleas of the Crown, vol. i., p. 159; and Phillimore's International Law, vol. iii., p. 186.]

Austen-Cartmell. Actual war continues until peace has been declared. All that *Attorney-General v. Weeden* (1) shows is that the title of the Crown cannot be completed by inquisition after peace has been declared. The conclusion of an armistice is not equivalent to the declaration of peace. All it does is to put an end for the time being to actual hostilities. It does not affect civil acts. As between nations an armistice is concerned only with military operations in the true sense of the words, and not with acts of a civil nature.

(1) Parker, 267.

C. A.
1920
FERDINAND,
EX-TSAR
OF
BULGARIA,
In re.
—

C. A. There is no authority to show that the opinion of Grotius
1920 is part of the municipal law of England. *Attorney-General v.*
FERDINAND, *Weeden* (1) ought not to be extended to the case of an
Ex-Tsar armistice.
OF
BULGARIA, *Upjohn K.C.* in further reply. If there be no authority
In re. for extending *Attorney-General v. Weeden* (1) to the case of an
— armistice, there is none against it. The doctrine of Grotius
is a guide which may well be adopted by this Court.

Cur. adv. vult.

1920. July 30. LORD STERNDALÉ M.R. In this case the ex-Tsar of Bulgaria, who has obtained special leave for the purpose, appeals against two orders made on July 30, 1919, and August 13, 1919, by Eve J. and P. O. Lawrence J. respectively. By each order certain stocks and securities which formerly belonged to the appellant were vested in the Solicitor to the Treasury as trustee for H.M. King George V. The appellant was by birth of German nationality but according to his affidavit in 1887 he had become of Austro-Hungarian nationality by reason of holding a commission in the army of that country. In that year he was elected Prince of Bulgaria and in 1908 he assumed the title of Tsar. On being elected Prince of Bulgaria he became of Bulgarian nationality. War broke out between Bulgaria and this country in October, 1915, and the appellant thereupon became an enemy of His Majesty. At that time the stocks and securities in question were held by Messrs. Coutts & Co. on behalf of the appellant, some of them being registered in his own name and some in the names of partners of Coutts & Co. who held them as trustees for the appellant. After the outbreak of war Messrs. Coutts & Co., acting in accordance with the provisions of the Trading with the Enemy Amendment Act of 1914, gave notice to the custodian appointed under that Act that they so held the said stocks and securities and also some bearer securities not the subject of this appeal. They were required to deposit, and did

deposit them with the Bank of England to the order of the Solicitor to the Treasury, and the partners in whose names some of them were registered signed declarations that they held them also to the order of the Treasury. No further step was taken in the matter until after the conclusion of an armistice with Bulgaria and the abdication of the appellant, which took place on September 29, and October 3, 1918, respectively. After his abdication the appellant went to Germany and was resident there at the conclusion of the armistice with Germany on November 11, 1918.

On June 27, 1919, a commission was issued under the Great Seal by virtue of which on July 10, 1919, an inquisition was held by which it was found that the appellant was on the outbreak of war beneficially entitled to the stocks and securities and that the same became and remained forfeited to His Majesty. The orders in question were then made on the dates before mentioned. On November 19, 1919, an order was made by the Board of Trade under s. 4 of the Trading with the Enemy Amendment Act, 1916, vesting the stocks and securities in the custodian, such order only to have effect in case of its being held that no forfeiture of them to His Majesty had taken place.

The points argued on the appeal were: (1.) Was it ever the common law of England that the Crown had the right to seize and claim as forfeited to it private property including choses in action found in this Kingdom belonging to subjects of an enemy State. (2.) If so had that right ceased to exist before the passing of the Trading with the Enemy Acts? (3.) If not, has it been abandoned or ceased to exist by reason of the legislation contained in the various Acts relating to trading with the enemy, so far as such legislation deals with the disposition of enemy property during the war? (4.) Had the Crown lost the right to claim the forfeiture of such property, because no inquisition had been held before the conclusion of the armistice with Bulgaria? These stocks and securities were choses in action belonging to the appellant, and I do not think any distinction can be drawn between legal and equitable

C. A.

1920

FERDINAND,
EX-TSAR
OF
BULGARIA,
In re.

Lord Sterndale
M.R.

C. A. interests in such choses in action. The stocks and securities
 1920 were the private property of the appellant and were in no
 FERDINAND, way part of the national revenues or property of the State
 EX-TSAR of Bulgaria. They would no doubt, if the appellant could
 OF have obtained possession of them, have been available for
 BULGARIA, use by him in the promotion of the war against this country,
In re. but probably he had no intention of so using them, and I
 Lord Sterndale think that from the legal point of view they must be
 M.R. considered in the same light as the private property of any
 other national of the enemy State. The fact that they were
 the property of the enemy sovereign is only important from
 a moral or political point of view in influencing the Crown
 to enforce the exercise of a right which it has not exercised
 for a long time, and probably would not have exercised
 against the property of a private person. I do not therefore
 think it necessary to discuss the question argued before us
 as to the position of the appellant as a sovereign under the
 constitution of Bulgaria, or the extent to which under that
 constitution he may be considered responsible for the war
 between this country and Bulgaria.

As to the first two questions I have no doubt that they
 should be answered against the appellant. I think the right
 to seize private enemy property existed and that nothing
 had occurred up to the beginning of the war with Bulgaria
 to deprive the Crown of that right unless that were the effect
 of the Trading with the Enemy Acts. The right is stated
 by Hale C.J. in his Pleas of the Crown to have existed
 originally, and although it was argued with some force that
 the cases in the Year Books to which reference is there made
 do not fully bear out the statement and have been questioned
 in Rolle's Abridgment, 195, it has been recognized and
 repeated as a correct statement of the law many times since.
 It is so stated also by the writers on international law,
 in Wheaton, 8th ed. (by Dana), ss. 304-308, and notes 157
 and 171; Phillimore, Part III., 132; Kent, Part I., 65;
 Wheaton, 5th ed. (by Phillipson), p. 419; and Hall, 7th ed.,
 pp. 460-464, and the notes to those pages. In Westlake's
 International Law, Part II., 47, the author after adducing

strong arguments to show that such a right should not continue says: "The time is now fully ripe when a British Court should not lag behind the position taken by Governments, but should boldly follow Lord Ellenborough." The allusion to Lord Ellenborough refers to the case of *Wolff v. Oxholm* (1), with which I shall deal later. I have quoted Westlake's words, because they show that although the author strongly condemned the practice of seizing private property he did not consider that the law as then existing prohibited it, and earlier in the same passage he had referred to the decision of Dr. Lushington in *The Johanna Emilie* (2), where the existence of the right was clearly stated. It was also so held in America in *Brown v. United States* (3), though in the circumstances of that case the Court decided that there was no right to seize the goods in question. The only statement to the contrary in a modern writer that I have found is in Oppenheim, vol. ii., s. 102, where he says that the right to seize private property is obsolete, and that there is a customary international law prohibiting the confiscation of private property and the annulment of enemy debts on the territory of a belligerent. If this only refers, as I think it does, to a general confiscation and annulment and not to a right in the Crown to seize in particular instances it is not, whether correct or not, opposed to what I think is the law. If it be intended to extend to the right to seize I think it is opposed to other authorities and incorrect.

Great reliance was however placed by the counsel for the appellant on the case of *Wolff v. Oxholm* (1) to which reference has already been made. In that case a Danish subject ordinarily resident in Denmark was sued for a debt due to the plaintiffs who were carrying on business in England. His defence was that he had during the war between England and Denmark paid the debt to Commissioners appointed by the Danish Government, by whose order all debts due to English subjects by Danes were sequestrated and made payable to the Commissioners. Lord Ellenborough delivering

C. A.

1920

FERDINAND,
EX-TSAR
OF
BULGARIA,
In re.

Lord Sterndale
M.R.

(1) 6 M. & S. 92.

(2) Spink's Prize Cas. 14.

(3) (1814) 8 Cranch, 110.

C. A. 1920
 FERDINAND,
 EX-TSAR
 OF
 BULGARIA,
In re.
 Lord Sterndale
 M.B.

the judgment of the Court of King's Bench in 1817 held the defence bad and the ordinance to be contrary to the law of nations. The actual decision related to a general confiscation of mercantile debts, and Lord Ellenborough referred in his judgment to the protection given to merchants by Magna Charta, but he did use expressions which show that he considered that there was no right to seize any property of an incorporeal nature. This judgment has been the subject of criticism in Wheaton, 8th ed. (by Dana), s. 308, and is in my opinion, if it go to the length contended by the appellant's counsel, opposed to the decision I have already mentioned in *The Johanna Emilie* (1) and also to *Land v. Lord North* (2), where Lord Mansfield speaks of that summum jus which undoubtedly gives all enemies' property coming into this country to the King. In *Furtado v. Rogers* (3) also the right to seize property and debts seems to have been recognized by Lord Alvanley, though he does not expressly decide the question. It seems also clear that Lord Ellenborough was in error as to some of the historical facts upon which he relies in his judgment. It is pointed out in Hall's International Law, p. 462, n. 1, that he was incorrect in stating that the ordinance in question "stood single and alone unsupported by any precedent and that no instance of such confiscation except the ordinance in question is to be found for more than a century," and instances are given in that note to the contrary. There were also produced before us in the argument instances of Exchequer Special Commissions in 1693, 1705, 1797, 1806, 1807 and 1812 under which inquisitions were found forfeiting to the Crown private enemy property including choses in action, and in one case at least Government securities which would not now be seized. In one case, namely, that of the inquisition held in 1697, the matter came before the Court in *Attorney-General v. Weeden* (4), where it was held that the inquisition was invalid because it was not held until after the conclusion of peace, but this decision was given: "Upon long debate

(1) Spink's Prize Cas. 14.

(3) 3 Bos. & P. 191.

(2) 4 Doug. 266-274.

(4) Parker, 267.

it was resolved First that choses in action which belonged to an alien enemy were forfeited to the Crown." Lord Ellenborough seems to have been unaware of these inquisitions. I ought perhaps to mention that other inquisitions forfeiting property in 1854 were produced, but I attach no importance to them, because they related to certain steam vessels under construction for the Emperor of all the Russias during the Crimean War. These steam vessels may well have been considered enemy government property which might be used in the war. Taking these matters into consideration I do not think *Wolff v. Oxholm* (1) displaces the other authorities to which I have referred.

C. A.
1920
Ferdinand,
Ex-Tsar
OF
BULGARIA,
In re.
Lord Sterndale
M.R.

The appellant's counsel also relied on statements made by Lord Finlay and Lord Haldane in *Stevenson v. Cartonnagen-Industrie*. (2) I think the short answer to this contention is that the question now under consideration was not before their Lordships at all. The case arose out of the right of partners inter se in the partnership property, and the question of the right of the Crown to seize was not present to their Lordships' minds. I think from the context that probably all that was meant by those statements was that war by itself did not effect a confiscation of private enemy property. I have thought it right to examine these authorities and form a conclusion upon them, but in my opinion the question is concluded so far as this Court is concerned by the judgment of the full Court of Appeal in *Porter v. Freudenberg*. (3) The Lord Chief Justice in delivering the judgment said: "Alien enemies have no civil rights or privileges unless they are here under the protection and by permission of the Crown: Blackstone, 21st ed., vol. i., c. 10, p. 372. Indeed, under the ancient common law, 'debts and goods found in this realm belonging to alien enemies belong to the King and may be seized by him': see Hale's Pleas of the Crown, vol. i., p. 95. That the enemy's property was liable to confiscation is also shewn by the privilege granted under c. 30 of Magna Charta to merchant strangers

(1) 6 M. & S. 92.

(2) [1918] A. C. 239, 244, 247.

(3) [1915] 1 K. B. 857, 869.

C. A. coming into this realm, whereby the privilege was conceded
 1920 to merchants of a land making war against the Sovereign
 FERDINAND, and found in this realm that they should be attached without
 EX-TSAR harm of body or *goods* until it became known how English
 OF merchants were treated in the hostile State. If well treated,
 BULGARIA, the enemy merchants were to be well treated here, so that
In re. confiscation of the enemy merchants' property would only
 Lord Sterndale occur by way of reprisal or retaliation. Whether the right
 M.R. of the Sovereign to confiscate any of the alien enemies' goods
 or debts in this realm was ever exercised or not (see *Wolff v. Oxholm* (1) per Lord Ellenborough), there can be no doubt about the existence of the right: see *Attorney-General v. Weeden*. (2) Gibbs C.J. in *Antoine v. Morshead* (3) affirmed the principle that the Crown during the war may lay hands on debts due to the alien enemy, but if it do not, then on the return of peace the rights of the contracting alien are restored and he may himself sue to recover the debts: see also Walford's Parties to Action (mentioned later herein), at p. 653, and the authorities there cited from 19 Edw. 4 to *Antoine v. Morshead*. (3) " It is true that this was not the actual point for decision in that case, but I think the passage I have read was part of the reasoning by which the Court arrived at its conclusion. In any case if it be only a dictum I consider it is a dictum which we ought not to disregard. So far, therefore, I think the appellant's contention fails. .

The third question raises very different considerations. I doubt whether such a right as in my opinion existed could be lost by mere disuse unless such disuse took place in circumstances which would raise the inference of an international compact, but I think it is quite clear that the Crown can abandon and give up a right if it choose to do so. The question here is whether by the various Acts called Trading with the Enemy Acts it has so abandoned the right. There are several of these Acts, the first being passed on September 18, 1914. This does not affect the question

(1) 6 M. & S. 92, 102.

(2) Parker, 267.

(3) 6 Taunt. 237.

before us. The second Act was passed on November 27, 1914, and contained this recital: "Whereas it is expedient to make further provision for preventing the payment of money to persons and bodies of persons resident or carrying on business in any country with which His Majesty is for the time being at war (which persons and bodies of persons are hereinafter referred to as 'enemies'), in contravention of the law relating to trading with the enemy, and for preserving, with a view to arrangements to be made at the conclusion of peace, such money and certain other property belonging to enemies; and to make other provisions for preventing trading with the enemy." In s. 1, sub-s. 1, it is provided as follows: "The Board of Trade shall appoint a person to act as Custodian of enemy property (hereinafter referred to as 'the Custodian') for England and Wales, for Scotland, and for Ireland respectively, for the purpose of receiving, holding, preserving, and dealing with such property as may be paid to or vested in him in pursuance of this Act, and if any question arises as to which Custodian any money is to be paid to under this Act, the question shall be determined by the Board of Trade." Sect. 2, sub-ss. 1, 2 and 3, provide for giving notice, to which I have referred, by persons in whose hands the property belonging to the enemy happens to be. Sect. 4, sub-s. 1, provides: "The High Court or a judge thereof may, on the application of any person who appears to the court to be a creditor of an enemy or entitled to recover damages against an enemy, or to be interested in any property, real or personal (including any rights, whether legal or equitable, in or arising out of property, real or personal), belonging to or held or managed for or on behalf of an enemy, or on the application of the Custodian or any Government Department, by order vest in the Custodian any such real or personal property as aforesaid"—that is the real and personal property of the enemy—"if the court or the judge is satisfied that such vesting is expedient for the purposes of this Act, and may by the order confer on the Custodian such powers of selling, managing and otherwise dealing with the property as to

C. A.

1920

FERDINAND,
EX-TSAR
OF
BULGARIA,
In re.

Lord Sterndale
M.R.

C. A 1920 FERDINAND, EX-TSAR OF BULGARIA,
In re.
 Lord Sterndale M.R.

the court or judge may seem proper." The duties of the Custodian are defined in s. 5, sub-s. 1: "The Custodian shall, except so far as the Board of Trade or the High Court or a judge thereof may otherwise direct, and subject to the provisions of the next succeeding sub-section, hold any money paid to and any property vested in him under this Act until the termination of the present war, and shall thereafter deal with the same in such manner as His Majesty may by Order in Council direct." The Trading with the Enemy Amendment Act, 1916, by s. 4, sub-s. 1, gave power to the Board of Trade by order to vest enemy property in the Custodian in these words: "The Board of Trade, in any case where it appears to them to be expedient to do so, may by order vest in the custodian under the Trading with the Enemy Amendment Act, 1914, any property, real or personal (including any rights whether legal or equitable, in or arising out of property, real or personal), belonging to or held or managed for or on behalf of an enemy or enemy subject, or the right to transfer that property, and may by any such order, or any subsequent order, confer on the custodian such powers of selling, managing and otherwise dealing with the property as to the Board may seem proper": and it was under these powers that the order of November 19, 1919, was made. The argument on behalf of the appellant is that these Acts were meant to state the powers, and the only powers, which the Crown intended to exercise during the then war. The Crown however contended that the powers conferred by this Act were only intended to be additional and supplementary to the common law rights of forfeiture, and in support of this contention some reliance was placed upon the word "further" in the recital of the Act of November 27, 1914. I do not attach any importance to this word, I think it only refers to the conferring of powers beyond those conferred by the Act of September 18, 1914, although it is inaccurate to speak of making further provision for preserving enemy property when the earlier Act contained none. I think the Legislature, noticing that the word "further" applied to the powers as to trading mentioned in

the earlier part of the recital, omitted to notice that it was inappropriate to the latter part. It is fairly clear, I think, that the powers conferred by these Acts are in important respects inconsistent with the exercise of the common law right of forfeiture. If an order had been previously made by the Board of Trade vesting the property in the custodian I do not see how the right of forfeiture could be exercised or an inquisition held which could find that the property was enemy property forfeited to the Crown when it was already vested in the custodian to be disposed of according to Order in Council. The powers conferred by the Act no doubt afforded a readier and more convenient method of dealing with enemy property than the somewhat cumbrous method of procedure by inquisition, and were therefore useful to the Crown, but I do not think that is the only effect of the Act. It seems to me that a power to vest property in a custodian to be dealt with at the end of the war as His Majesty should by Order in Council direct is inconsistent with an intention of preserving a power to insist on an absolute forfeiture at common law. The one contemplates a discretion as to the disposal of the property which would no doubt be affected by the provisions of the Treaty of Peace, while the other works an absolute forfeiture following the exercise of a right still in existence but unexercised in late years. The right to forfeiture and the Trading with the Enemy legislation are concerned with all enemy property, and it must be remembered that the right to forfeit, although its existence is recognized, has been criticised and its exercise deprecated by practically all writers on international law in modern times. In these circumstances I think that if the Crown in taking powers in many respects inconsistent with that right meant also to preserve it the intention to do so should be clearly shown, and in my opinion that is not the case. Some confirmation of this view, though not perhaps very much, is obtained from s. 14, sub-s. 1, of the Trading with the Enemy (Amendment) Act, 1914. This section contains a saving of certain powers of His Majesty existing apart from the Act, and does not mention this right of forfeiture.

C. A.
1920
FERDINAND,
EX-TSAR
OF
BULGARIA,
In re.
Lord Sterndale
M.R.

C. A. The conclusion to which I have come seems to be in
 1920 accordance with the view expressed by Bankes L.J. in
 FERDINAND, *Stevenson v. Cartonnagen-Industrie* (1), where he said: "The
 EX-TSAR whole of the legislation which has been passed since the begin-
 OF ning of the war dealing with enemy property in this country
 BULGARIA, rests on the assumption that the Crown is not insisting on
In re. any common law right to claim such property." The actual
 Lord Sterndale point was not, as I have mentioned in commenting on the
 M.R. decision in the same case in the House of Lords, before the
 Court, and therefore these words are only a dictum, but I
 think they are correct.

I think, therefore, that on this ground the appeal should be allowed, and the orders appealed from discharged. I express no opinion as to the effect of this decision or whether it will or will not be beneficial to the appellant. The securities may remain still vested in the custodian under the order of the Board of Trade of November 19, 1919, in which case they are removed from the control and beneficial ownership of the appellant according to the decision in *In re Münster*. (2) This question is not before me and I express no opinion upon it.

In view of the conclusion at which I have arrived on this point the last question becomes immaterial. As I have already mentioned, the securities were seized in the year 1916, but in order to give the Crown a complete title an inquisition of office was necessary: see *Attorney-General v. Weeden* (3) before mentioned, and such inquisition did not take place till after the armistice. I incline to the opinion that the conclusion of the armistice is not equivalent to the conclusion of peace so as to render invalid an inquisition held in the circumstances of this case after its conclusion, but I do not give any judgment on the point.

WARRINGTON L.J. This is an appeal from two orders, one made by Eve J., and the other by P. O. Lawrence J. The effect of each order is the same—namely, to vest in the

(1) [1917] 1 K. B. 852.

(2) [1920] 1 Ch. 268.

(3) Parker, 267.

Solicitor to the Treasury, as trustee for His Majesty, certain registered stocks and securities, the beneficial interest in which had previously been vested in Ferdinand, the ex-Tsar of Bulgaria, one of His Majesty's enemies in the war. The ex-Tsar applied for, and obtained, special leave to appeal from both orders.

C. A.
1920
FERDINAND,
EX-TSAR
OF
BULGARIA,
In re.
Warrington L.J.

The appeal raises the important question whether the Crown has, by the law of this country, the right, on taking the appropriate steps, to claim as forfeited to itself the movable property, and, in particular, choses in action, belonging to an enemy, and found in this country during a war between this nation and that to which the enemy belongs.

The appellant contends that the right claimed is not shown ever to have been vested in the Crown, and, further, that if it was formerly so vested it is so no longer, either because by long disuse it must be treated as abandoned, or because it has been superseded by certain statutes, the last of which, and the only ones now in force, are the Trading with the Enemy Acts passed during the late war. He contends, further, if he fails in the above-mentioned contentions, that in the present case the necessary steps were not taken in due time, and he raises some technical points which I will notice hereafter.

It is not contended on behalf of the Crown that the outbreak of war of itself transfers to it the property in this country of an enemy, but it is admitted that an inquisition of office is necessary to complete its title. It is not disputed that the property in question is private property of the ex-Tsar, and not public property of the State.

The enemy whose property is claimed in the present case was, of course, the sovereign of a country at war with us, but the Crown does not suggest that this fact is relevant in point of law. It is merely referred to as a justification, if any such were required, for the exercise, as a matter of policy, of a right which the advisers of the Crown contend exists as against the property in this country of all enemies, whether the sovereign, or the subjects of a State at war with ourselves.

C. A. In the year 1887 the appellant was elected Prince of
 1920 Bulgaria, and in the year 1908 he assumed the title of Tsar.
 FERDINAND, At the time of his original election he was of German
 EX-TSAR nationality, but he thereupon became a Bulgarian. War
 OF between the United Kingdom and Bulgaria broke out on
 BULGARIA, October 15, 1915. At this time certain stocks and securities
In re. were registered in the name of the appellant, the indicia of
 Warrington L.J. title being in the custody of Messrs. Coutts, the appellant's
 bankers; certain others were registered in the names of
 partners in the firm as trustees for the appellant; certain
 Bearer Bonds were also in their possession as trustees. The
 present proceedings relate to the registered stocks and
 securities only.

Under s. 3 of the Trading with the Enemy (Amendment)
 Act, 1914, it became the duty of Messrs. Coutts to notify
 to the custodian the facts just mentioned, and they duly
 performed that duty, and thereby the representatives of the
 Crown became aware of the facts.

On July 27, 1916, Messrs. Coutts & Co. were informed that
 the Lords of the Treasury were not prepared to treat the
 securities in question as being enemy private property, and
 they were requested to deposit them with the Bank of
 England to the order of the Secretary to the Treasury.
 Messrs. Coutts & Co. complied with this request, and the
 securities in question, together with the Bearer Bonds, were
 forthwith deposited with the bank to the order of the
 Secretary to the Treasury. The members of their firm,
 in whose names certain of the stocks and shares were
 registered, signed on the demand of the Treasury declarations
 that such stocks and shares were held to the order of the
 Treasury. All this took place in the year 1916.

An armistice with Bulgaria was concluded on Sep-
 tember 29, 1918. The appellant abdicated the throne on
 October 3, 1918, and thereupon went to reside at Coburg,
 in Germany. An armistice with Germany was concluded
 on November 11, 1918.

On July 10, 1919, an inquisition was held pursuant to a
 commission under the Great Seal dated June 27, 1919, and

it was thereby found that the shares and securities in question were the property of the appellant, an enemy of the King and country.

The orders appealed from were made respectively on July 30, and August 13, 1919.

On November 19, 1919, pursuant to s. 4 of the Trading with the Enemy Act, 1916, an order was made by the Board of Trade vesting the securities in question in the custodian, but this order was expressed to take effect solely in the event of the forfeiture alleged to have been effected by the circumstances above mentioned being invalid, or ineffective.

The securities registered in the name of the appellant himself are all stocks of British companies, including in that category an annuity of the East India Railway Co. The great bulk of those registered in the names of other persons as trustees for him are also stocks of various descriptions of British companies incorporated under the Companies Acts, and certain stock of the Port of London Authority. The list also includes stocks of the Hudson Bay Co., and of the Province of Ontario, and of the City of Vancouver, and debenture stock of the Trust and Loan Co. of Canada. There is one item, debenture stock of the Monterey Light and Power Co., which I understand is a foreign company. No distinction has been drawn in argument between the stocks of British companies and corporations and those of other bodies, and I think we are entitled to treat them all on the same footing as choses in action owing in this country, either to the appellant, an enemy, or to British subjects in trust for him. It was suggested rather than argued that there may be a distinction between the legal and equitable interests of an enemy in choses in action, but in my opinion no such distinction is made out.

The first question, then, is this : Was it part of the common law of England which would remain in force to this day, unless altered by statute, or by some other means known to our law, that the King in right of his Crown is entitled to claim as forfeited to him choses in action owing in this country to an enemy, the national of a State at war with the

C. A.

1920

FERDINAND,

EX-TSAR

OF

BULGARIA,

In re.

Warrington L.J.

C. A. United Kingdom? In my opinion that such a right existed
 1920 at common law is amply established by the authorities.
 FERDINAND, In Hale's Pleas of the Crown we find it stated that by the
 EX-TSAR law of England debts and goods found in this realm belonging
 OF to alien enemies belong to the King, and may be seized by
 BULGARIA, him. He gives two references to Year Books of Edward IV.
 In re. which it is said do not support his proposition. I do not stay
 Warrington L.J. to examine these, for it seems to me that even if they do
 not affirmatively support his statement, they do not con-
 tradict it, and this being so the authority of that very learned
 Chief Justice is sufficient. But the proposition does not
 rest on this authority alone. In the *Attorney-General v.*
Weeden (1): "Upon long debate it was resolved first that
 choses in action which belonged to an alien enemy were
 forfeitable to the Crown." In 1785, in *Land v. North* (2),
 Lord Mansfield refers to: "That summum jus which
 undoubtedly gives all enemies' property coming into this
 Kingdom to the King." In 1802, in *Furtado v. Rogers* (3),
 it was asserted in argument: "That by the law of England
 all the property of alien enemies, including their debts, is
 vested in the Crown, and upon office found the King is
 entitled to reap the benefit of all contracts made for their
 advantage." Lord Alvanley C.J., in delivering the judgment
 of the Court, alludes to this argument (4) in the following
 terms: "With respect to the argument that all contracts
 made with an enemy enure to the benefit of the King during
 the war, and that he may enforce payment of any debt due
 to an alien enemy from any of his subjects, we think it is not
 entitled to much weight. Such a course of proceeding never
 has been adopted; nor is it very probable that it ever will
 be adopted, as well from the difficulties attending it, as the
 disinclination to put in force such a prerogative." It is
 to be observed that the learned Chief Justice does not deny
 the existence of the right, and in saying that the suggested
 course of proceeding never has been adopted he was, as the
 records produced before us show, misinformed on the facts.

(1) Parker, 267.

(2) 4 Doug. 274.

(3) 3 Bos. & P. 191, 194.

(4) 3 Bos. & P. 200.

Lastly, the existence of the right was recognized by Lord Reading C.J. in giving the judgment of the full Court of Appeal in *Porter v. Freudenberg*. (1)

C. A.

1920

FERDINAND,
EX-TSAR
OF
BULGARIA,
In re.

Warrington L.J.

So far I have considered the authorities in support of the contention that by the common law of England the Crown has the right, if it chooses to exercise it, to seize as forfeited to itself the property of enemies found within the realm at the outbreak of war. But the authorities on international law establish that the existence of such a right, and its exercise by the sovereign authority is in accordance with that law also. It is not necessary to refer to all the authorities on the point. A note No. 156 on p. 387 of Dana's Edition of Wheaton, and a decision therein discussed of *Brown v. United States* (2), a decision of the Supreme Court of the United States, are sufficient authority for the proposition that by the law of nations the right *stricti juris* exists, though its exercise may, as a matter of policy, not be resorted to. A further note, No. 157 at p. 391, shows that the right of confiscation extends to debts due to enemies. It is true that in recent times, for reasons of a moral or economical nature, the exercise of the right has not been resorted to, and has been deprecated by writers on international law (for example, by Professor Westlake, at p. 44 of *International Law*, Part II.), but this fact does not destroy the right. To effect this result there would have to be either some legislative Act altering the existing law, or some rule or usage superseding the right accepted as binding by civilized States generally, and by our own Government in particular: see *West Rand Co. v. The King*. (3) The second alternative has not been established. As to the first, it is said that the required alteration of the law has been effected by the Trading with the Enemy Acts passed in the present war. This point is one which requires serious consideration, and I will return to it presently. There is, however, one authority which it is contended establishes that so early as 1817 the right had become obsolete, and was no longer

(1) [1915] 1 K. B. 857, 870.

(2) 8 Cranch, 110.

(3) [1905] 2 K. B. 391, 406.

C. A. part of the law. This authority is the judgment of Lord
1920 Ellenborough in *Wolff v. Oxholm*. (1) The action was
FERDINAND, brought to recover a debt due to the plaintiffs from a Danish
EX-TSAR subject resident in Denmark, but temporarily in England.
OF
BULGARIA, The defence was that the defendant had, during the then
In re. recent war, paid the debt to Commissioners appointed by the
Warrington L.J. Government of Denmark to receive debts due by Danes
to British subjects, which, by a law or ordinance of the
Government of Denmark, were declared to be sequestrated
and detained. There are, however, certain points in this
case which seem to me to distinguish it from the case before
us. In the first place the ordinance in question, which the
Court held to be not in accordance with the law of nations,
was an ordinance purporting to sequester, in general terms,
all debts due by Danes to British subjects, not an assertion
by the Danish Government of a right already existing to
seize the property of an enemy found in the country during
war, and I cannot, in the face of the authorities to which I
have referred, regard the case as negating the existence
of the right recognized in those authorities. Again, the
debt appears to be a commercial debt, and the learned Lord
Chief Justice relies upon *Magna Charta*, c. 30, and the
privilege thereby conferred on merchant strangers as showing
that by the law of England commercial debts are not to
be confiscated except by way of retaliation. Moreover, the
Court held that the payment made to the Commissioners
was voluntary, and not under the compulsion of legal
proceedings founded on the ordinance. The Lord Chief
Justice also appears to have been unaware of the exercise by
the Crown of the right in question during then recent times.
I do not think that case decided more than that the
ordinance there in question was not binding in the Courts
of this country, and that even if it were the voluntary
payment under it would not be an answer to the plaintiff's
claim. So far, I agree with the argument of the Crown.
I think it has been established that the right in question is
a part of the ancient common law of England, and that its

(1) 6 M. & S. 92.

exercise is not forbidden by any usage accepted by this country as binding upon the authorities of the Crown.

But it is said that the right claimed by the Crown has been superseded by the Trading with the Enemy Amendment Act, 1914. This contention is based by analogy on the principle that prerogative is: "The residue of discretionary or arbitrary authority which at any given time is legally left in the hands of the Crown," and that where a particular act claimed to be within the prerogative of the Crown is found to be authorized by statute it can only be performed in accordance with the statute: see *De Keyser's Royal Hotel v. The King* (1) and *Attorney-General v. De Keyser's Royal Hotel*. (2) I may point out that prerogative properly describes the power and authority of the King in relation to his own subjects, and not rights vested in him in relation to persons owing no allegiance to him, but I think by analogy the same principle should be applied, and that such a right as that in question might be superseded by a statute, the provisions of which covered the same ground, and could be inferred to be substituted for it.

It remains then to consider whether the statute in question has for the late war had the effect of superseding the common law power of forfeiture vested in the Crown. There are some matters connected with the exercise of the common law right which I think must be borne in mind in considering the construction and effect of the statute. In the first place, it is well settled that the outbreak of war does not of itself effect a forfeiture, nor can the Crown assert its right by simply seizing the property, or requiring the person in whose custody it is to transfer it to an officer of the Crown; the title of the Crown must first be found by inquisition of office, and this must be done before the conclusion of peace: *Attorney-General v. Weeden*. (3) The right is one, therefore, which has annexed to it conditions which render it, to some extent, inconvenient and expensive in its exercise. Then, again, if it is exercised the effect is merely

C. A.

1920

FERDINAND,
EX-TSAR
OF
BULGARIA,
In re.

Warrington L.J.
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(1) [1919] 2 Ch. 197.

(2) [1920] A. C. 508.

(3) Parker, 267.

C. A. 1920
FERDINAND,
EX-TSAR
OF
BULGARIA,
In re.
Warrington L.J.

to merge the property affected in other moneys and property of the Crown, without any special provisions under which, for example, use may be made of it to pay enemy debts in this country. Lastly, for more than one hundred years it has not been exercised, so far as any record produced to us shows, in the case of private property of enemies, the only form of property with which we are concerned, and the tendency of writers on international law has been, while admitting the existence of the right, to deprecate on grounds of humanity and from economical considerations, the assertion of it in the times in which we live. See Dana's *Wheaton*, p. 451, and *Westlake*, in the passage above referred to. These are considerations which suggest that the authorities acting under the Crown may well have desired to obtain by statute more convenient and effective powers than those vested in the Crown at common law. The Act in question is the Trading with the Enemy Amendment Act, 1914. The preamble is as follows: "Whereas it is expedient to make further provision for preventing the payment of money to persons and bodies of persons resident or carrying on business in any country with which His Majesty is, for the time being, at war (which persons and bodies of persons are hereinafter referred to as 'enemies') in contravention of the law relating to trading with the enemy, and for preserving with a view to arrangements to be made at the conclusion of peace such money and certain other property belonging to enemies; and to make other provisions to prevent trading with the enemy." Sect. 1 provides for the appointment by the Board of Trade of a custodian of enemy property, the person to be appointed for England and Wales being the Public Trustee, an officer of the Crown (Public Trustee Act, 1906, s. 5). After provision for payment to the custodian of dividends, etc., otherwise payable to an enemy (s. 2), and for obtaining information as to enemy property in the hands of persons in this country (s. 3), power is, by s. 4, given to the Court on the application of, amongst other persons the custodian, or any Government Department,

to make an order vesting in the custodian any property, real or personal, belonging to an enemy, and the custodian is, subject to certain provisions as to administration, management, and so forth, to hold any money paid to, and property vested in him under the Act until the termination of the war, and is thereafter to deal with the same in such manner as His Majesty may, by Order in Council, direct (s. 5, sub-s. 1). A limited power is given to the custodian of paying the debts of the enemy owing to persons in this country. There is (s. 14) a saving of the power of His Majesty by Proclamation to prohibit transactions not prohibited by the Act, or to license transactions which are so prohibited; there is no saving of the power of forfeiture. It has recently been decided by Russell J., in *In re Münster* (1), that pending its disposition by Order in Council the property is removed from the control, and from the beneficial ownership of the enemy, so that the custodian cannot be treated as a trustee for him. The correctness of this decision was not disputed before us, and I will assume it to express the true effect of the Act. If this is so it was competent to the Crown, through the action of its own officers, to obtain the vesting of the property in question in the officer designated by the Act, and, after the war, to deal with the same in such manner as His Majesty, by Order in Council, may direct, and the beneficial ownership of the former enemy owner would be at first suspended, and might by the Order in Council be altogether disposed of for any purpose the King in Council might think fit. The Act obviously binds the Crown, and I think its provisions supersede the right which the Crown had by a different process to obtain possession and control of enemy property. The provisions of the Act give the Crown the power, by the action of one or other of the Government Departments, to secure for its own officer such possession and control during the war, and the disposition of the property thereafter, and I cannot think it was intended that the less convenient, and, I think I may say, the obsolescent right of

C. A.

1920

FERDINAND,

EX-TSAR

OF

BULGARIA,

In re.

Warrington L.J.

(1) [1920] 1 Ch. 268.

C. A. forfeiture was still to remain side by side with the powers
 1920 deliberately conferred by the Legislature, following, as was
 FERDINAND, pointed out by Younger J., as he then was, in *Holt v.*
 Ex-TsAR
 OF
 BULGARIA, *A. E. G. Electric Co.* (1), the policy adopted by enemy
In re. countries themselves.

Warrington L.J. The orders appealed from were obtained on the footing
 that the appellant, as to the securities registered in his name,
 was trustee thereof, for the Crown, and that the persons
 in whose names the remaining securities were registered
 were also trustees for the Crown. The title of the Crown
 depended upon the validity of the forfeiture. For the
 reasons I have just given, I think the forfeiture was invalid,
 and the appeal therefore succeeds, and the two orders should
 be discharged. The result would appear, *prima facie*, to be
 that by virtue of the order of the Board of Trade the
 property is vested in the custodian, and, if so, the appellant's
 victory would not be of much service to him; it must not
 be taken, however, that I express a final opinion on this
 point, which is not before us.

It is unnecessary, in view of the opinion I have formed,
 as to the effect of the Act of 1914, to deal at length with
 the other points made by the appellant. I think, however,
 I ought to mention two. First it was said that the right
 must be taken to have become obsolete. Whether mere
 desuetude would be enough to destroy such a right I venture
 to doubt. From the records produced, however, it appears
 that it was exercised several times in the French Wars of
 the end of the eighteenth, and the beginning of the nine-
 teenth centuries. The only European war in which we
 have been engaged since then until 1914 was the Crimean
 War, and though there is no record of the right being
 exercised as regards private property during that war, I
 cannot think that such non-exercise alone—non-exercise in
 one particular war—can be sufficient to establish abandonment
 for all time.

Secondly, objection was taken that the inquisition came
 too late, inasmuch as it was after the armistice, which, it

was said, for this purpose was equivalent to the conclusion of peace. I cannot take this view. The armistice put an end to military operations, but I cannot regard the exercise of the right of forfeiture as something of that nature.

The appellant, therefore, in my opinion, succeeds, but only on the ground that the ancient right of the Crown is now merged in the provisions of the statute.

C. A.
1920
FERDINAND,
EX-TSAR
OF
BULGARIA,
In re.

YOUNGER L.J. I have had the opportunity of reading the judgments just delivered by my Lord and the Lord Justice, and I agree so entirely with the conclusions there expressed, and with the reasoning by which they have been reached, that I permit to myself the privilege of shortly dealing with the case in somewhat general terms.

Notwithstanding the very able arguments to the contrary I cannot bring myself to doubt, for the reasons which my colleagues have given, that apart from the Trading with the Enemy Acts the King during the late war remained duly invested with the right which was his by the common law to claim after office found, as forfeited to himself, all debts and choses in action within the realm owing or belonging to the appellant, an enemy of His Majesty. Further I can have no doubt that although exercised after the armistice with Bulgaria, and, if the fact be relevant, after the armistice with Germany also, His Majesty's right of forfeiture was in the present case exercised in due time in that it was exercised before the conclusion of peace with either country. That this right over such property of his enemies was by the common law in ancient times vested in the reigning sovereign of this realm is, I think, established by the authorities referred to in the judgments just delivered, and if, apart from statute, it remains at the present day exercisable at all, it is by the King in right of his Crown that it is to be exercised. But even if this were otherwise the appellant would not, for that reason only, be entitled, as I think, to succeed in his appeal. It is not as an exercise of his prerogative right that the action of His Majesty must be regarded by the

C. A. 1920
FERDINAND,
EX-TSAR
OF
BULGARIA,
In re.
Younger L.J.

appellant. A question of prerogative arises only as between the King and a subject of his own, and if the appellant would, apart from statute, succeed in his present appeal he must, I think, establish not merely, as at times during the argument was apparently his object, that, from disuse, the ancient prerogative of the King of England had as such lapsed. He must go further. The question here is not really whether this right is exercisable by the King as part of his prerogative. The question, so far as the appellant is entitled to raise it, is whether apart from statutory enactment suspending the exercise of any such right His Majesty is not, as the representative of a sovereign State at war with Bulgaria, another sovereign State, entitled, as a belligerent, to forfeit this property of a Bulgarian national which he finds within his own realm, such a right being, it is said on His Majesty's behalf, one which is contrary to no principle of the law of nations recognized as binding by the Courts of this country. This position the appellant has, I think, entirely failed to displace. I cannot myself doubt that in this aspect of the question, and again apart from statute, the view of Story J. stated in *Brown v. United States* (1) would still be upheld here. "The rule of the law of nations is that every such exercise of authority is lawful, and rests in the sound discretion of the nation." The question at issue is therefore really a broad question of English law, and, so far as it is governed by the common law unaffected by statute the question must, as I have said, for the reasons given by the other members of the Court, be decided against the appellant. And, so far, I think, such a case as *Wolff v. Oxholm* (2) is of no assistance. It was not doubted in that case that the Danish ordinance there in question was by the law of Denmark valid in that country, although it was treated as of no effect here. So it may well be that any exercise by His Majesty of his right of forfeiture, even if valid here, would not be recognized elsewhere. It might well be regarded as a penal law of which no notice would be taken in the Courts of another country.

(1) 8 Cranch, 110.

(2) 6 M. & S. 92, 99.

As Lord Ellenborough said in *Wolff v. Oxholm* (1): "The penal laws of foreign countries are strictly local, and affect nothing more than they can reach and what can be seized by virtue of their authority." Such considerations, however, would be of no advantage to the appellant in his present appeal. The fact that the exercise of this right might be regarded elsewhere as in the nature of a penal ordinance casts, so far as the Courts of this country are concerned, no doubt upon the validity of such exercise.

C. A.
1920
FERDINAND,
EX-TSAR
OF
BULGARIA,
In re.
Younger L.J.

But when these points have been decided against the appellant such considerations as that just alluded to, and others of a like kind, become of immense significance in the determination of the question which remains for consideration—the question namely whether this right of the Crown has not been temporarily suspended by the Trading with the Enemy Amendment Acts, so that after the passing of the Amendment Act of 1914, and while it and the later statutes remain operative, the right is, at least, in abeyance; and the exceptional powers in relation to enemy property thereby conferred are the only exceptional powers with reference to such property for the time being in force.

In considering this question, which of course turns upon the true construction of the Act, and particularly the Amendment Act of 1914, to which I shall for convenience only hereafter refer, it is not unimportant to ascertain the views judicially held on the subject in this country during the late war. In that connection the statements in the House of Lords itself, based doubtless upon the long disuse of the right and importing that it had in effect ceased to exist, while not binding to the full extent for reasons which have already been given by the Master of the Rolls, cannot be disregarded in considering the true scope of the statute. In this connection the statement of Lord Finlay in *Stevenson's Case* (2), that "It is not the law of this country that the property of enemy subjects is confiscated. Until the restoration of peace the enemy can, of course, make no claim to have it delivered up to him, but when peace is

(1) 6 M. & S. 92, 99.

(2) [1918] A. C. 239, 244, 247.

C. A. restored he is considered as entitled to his property with
 1920 any fruits which it may have borne in the meantime,"
 FERDINAND, and the statement of Lord Haldane in the same case,
 EX-TSAR "The law of this country does not in general confiscate
 OF the property of an enemy. He cannot claim to receive it
 BULGARIA, during war, but his right to his property is not extinguished ;
In re. it is merely suspended," are very striking, and they certainly
 Younger L.J. justify a very generous construction being placed upon the
 statute in this matter. But apart from such judicial views
 the propriety of the exercise of any arbitrary right of
 forfeiture has been increasingly made the subject of dis-
 approval by writers on international law, while the unwisdom
 of its exercise in the general case, because such exercise was
 calculated to expose British subjects to like measures on
 the part of their enemies, and in many cases to put them
 in the position of being obliged to pay their debts twice
 over, was generally insisted upon. Of this last danger
 I can speak with some special knowledge derived from my
 experience of the administration under the Trading with
 the Enemy Acts in connection with which a special form of
 order known as the Freudenberg Order (see *In re Ling and*
Duhr (1)) had to be devised to save those who paid over
 enemy debts even to the custodian from the risk of
 having to pay them over again. Further, the judgment of
 Lord Ellenborough in *Wolff v. Oxholm* (2) had never been
 forgotten by those concerned in these subjects, and his
 approval in that judgment of the statute of 34 Geo. 3, c. 7
 —an Act very similar in principle to the Trading with the
 Enemy Amendment Act—is, it cannot, I think, be doubted,
 reflected in this latter statute.

That Act, amongst other things, appoints a custodian of
 enemy property ; requires all dividends, interest or share
 of profits which had a state of war not existed would have
 been payable and paid to or for the benefit of an enemy,
 to be paid to the custodian ; requires trustees for enemies
 to notify to the custodian the particulars of the property
 they so hold on trust, and empowers the Court on the

(1) [1918] 2 Ch. 298, 302.

(2) 6 M. & S. 92.

application of a creditor of an enemy, or of a person entitled to recover damages against him, or who claims to be interested in any property belonging to or held or managed for him or of the custodian or any Government department to vest enemy property in the custodian where the Court is satisfied that such vesting is expedient for the purposes of the Act; and the relevant purpose of the Act is recited to be to preserve with a view to arrangements to be made at the conclusion of peace money and certain other property belonging to enemies. The Court is empowered to confer upon the custodian such powers of selling, managing and otherwise dealing with vested property as to the Court may seem proper; and the custodian, except so far as the Board of Trade or the Court may otherwise direct, and subject to a power with the authority of the Court to pay out of property vested in him in respect of an enemy the whole, or any part of the debts of that enemy, is required to hold any moneys paid to and any property vested in him under the Act until the termination of the war and thereafter to deal with the same in such manner as His Majesty may by Order in Council direct. The Act contains this saving clause: "Nothing in this Act shall be construed as limiting the power of His Majesty by proclamation to prohibit any transaction which is not prohibited by this Act or by licence to permit any transaction which is so prohibited," and that is all.

Now it will be noticed that while under this Act every purpose of forfeiture under the prerogative not merely penal is attained, in that while its procedure when adopted is effective to deprive an enemy owner of property within the realm of any beneficial interest therein while the war lasts, its provisions also permit complete justice to be done to him on the conclusion of peace in respect of his property preserved and administered during the war. The Act, as I have said, is fully entitled to the same approval of its terms that Lord Ellenborough extended to the statute of George III.

In these circumstances I cannot doubt that the Act was

C. A. intended while it was in operation to supersede the prerogative right of forfeiture. The very limited saving clause 1920 is significant. And the exercise of such a prerogative is FERDINAND, inconsistent with the powers and duties of the custodian EX-TSAR OF conferred by the statute, while any conflict between the two BULGARIA, would in the general case undo the beneficial influence upon In re. the national reputation which the Act was intended to conserve. I cannot doubt that the effect of the Act, the King's prerogative being in suspense, is to bring about the realization, so far as this country is concerned, of Lord Parker's statement in the *Daimler Case* (1), that, subject to any legislation to the contrary or anything to the contrary contained in the Treaty of Peace when peace comes, enemy property in this country will be restored to its owners after the war just as property in enemy countries belonging to His Majesty's subjects will or ought to be restored to them after the war.

The appellant, it is true, stands in a very special position of his own, a position which doubtless prompted the advisers of the Crown to proceed in his case by forfeiture under the prerogative, a course the Crown has not adopted in any other instance. But in the argument it has had to be conceded that the position of the appellant cannot as a matter of law be distinguished from that of any other enemy as defined by the Act, and accordingly the forfeiture of his property now in question cannot, I think, be upheld. Any questions, if any there be, under the subsequently made vesting order under the statute do not of course arise on the present appeal, which must I think be allowed.

Appeal allowed.

Solicitors for appellant : *Farrer & Co.*

Solicitor for the Crown : *Treasury Solicitor.*

(1) [1916] 2 A. C. 307, 347.

In re SCHIFF.RUSSELL
J.HENDERSON *v.* SCHIFF.1920
Oct. 20.

[1920. S. 1397.]

Will — Construction — War Legislation—Gift of Life Interest to German National—"If precluded from taking," Over—Treaty of Peace with Germany—Charge—Public Policy.

Section 1, sub-s. (xvi.) of the Treaty of Peace Order, 1919, which by s. 1, sub-s. 2, of the Treaty of Peace Act, 1919, for carrying into effect the Treaty of Peace, has statutory effect, provides that "all property, rights and interests within His Majesty's Dominions . . . belonging to German nationals at the date when the Treaty comes into force . . . and the net proceeds of their sale, liquidation or other dealings therewith, are hereby charged (a) . . . with payment of the amounts due in respect of claims by British nationals with regard to their property rights and interests . . . in German territory, or debts owing to them by German nationals'

Testator, who died before November 11, 1918, the date of the armistice in the war with Germany, gave the income of trust funds to German nationals for life, and directed (clause 23) that, if as the result of legislation owing to the war any beneficiaries who were German subjects were precluded from taking, their interests should be held in trust for other persons not German subjects till the German beneficiaries should be able by reason of further legislation to take, and he expressed a wish that the non-German beneficiaries would when the law allowed repay to the German beneficiaries the sums which would but for this clause have passed to them. Clause 25 provided that, if any person to whom a life interest in a trust fund was given should charge the income or by reason of any event the income would become charged in favour of other persons, his life interest should determine and the income be dealt with as if he were dead, subject to a discretionary trust in favour of him and others:—

Held, that the true construction of clause 23 was that the life interests given to the German nationals were only till the Treaty of Peace came into force and then ceased, and the Treaty had no operation to charge them.

Held, also, that the clause so construed was not against public policy.

Held, further, that in the circumstances clause 25 did not apply.

By his will dated March 11, 1918, Sir Ernest Frederick Schiff bequeathed (clause 4) to the plaintiffs, his executors, certain investments and securities upon trust to pay the income thereof to his sisters the defendants Jenny Schiff and Giustina Rodenberg in equal shares during their joint lives and to

RUSSELL the survivor during her life and after the death of the survivor in trust for a niece and her son. He bequeathed his residuary estate on trust for conversion and (clause 14) to pay the income of one equal fourth part to Jenny Schiff and of another fourth part to Giustina Rodenberg during their respective lives and the income of the two remaining fourth parts to nephews and nieces for life and afterwards (clause 21) in trust for their children. By a codicil he substituted a grand-niece for one of the nephews. By clause 23 of the will, "if as the result of legislation in Great Britain owing to the present war any of the beneficiaries under this my will who are German subjects are precluded from taking such interests as I have by this my will bequeathed to or for their benefit then I direct that the interests which they would but for such legislation have been entitled to take shall be held by my trustees upon trust to pay the income if such interests consist of income and the income of the capital of such interests if the same consist of capital to my said nephews and nieces who are not German subjects in equal shares until such time as the said beneficiaries who are German subjects are able by reason of any further legislation to take their interests under this my will but nevertheless I express a wish though without imposing upon them any express trust that my said nephews and nieces who are not German subjects will when the law permits them to do so repay to the said beneficiaries who are German subjects such sums as would but for the provisions of this clause have passed to them under the other provisions of this my will but if the effect of such first-mentioned legislation is only to enact that any such interests shall be held by the Public Trustee or other British Government official pending the duration of the present European war then I direct that such interests shall not pass to beneficiaries under this my will other than the beneficiaries who are German subjects." Clause 25: "(i) If any person to whom a life interest in any part of the trust funds under this my will is hereinbefore given shall at any time alienate or charge or affect to alienate or charge the income of such trust funds or any part thereof

or if by reason of any act or event done or happening whether before or after such life interest shall come into possession or before or after my death the said income or any part thereof shall or but for this provision would become vested in or charged in favour of some other person or persons or a corporation then the trust hereinbefore contained of the said income in favour of such person shall immediately thereupon fail and determine as the case may be. (ii) During the parts (if any) of the life of such person during which such person shall not be entitled to receive the income of the trust funds or any part thereof or during such shorter period my trustees shall pay or apply all or any part thereof to or for the personal support or benefit of any or any one or more exclusively of the following persons namely such person above referred to and his wife or her husband as the case may be and issue (if any) for the time being in existence and the person or persons for the time being interested in the trust premises under the trusts hereinbefore declared to take effect after the death of such person in such shares and manner as my trustees shall from time to time in their absolute discretion think proper. (iii) Subject to such discretionary trust or power my trustees shall hold the said income upon the trusts upon which the same would for the time being be held if such person were then dead."

RUSSELL
J.
1920
SCHIFF,
In re.
HENDERSON
v.
SCHIFF.
—

The testator died on November 5, 1918—i.e., before the armistice between England and Germany; his will and codicil were duly proved, and the estate was being administered.

Jenny Schiff and Giustina Rodenberg were German nationals residing in Germany.

The income of the securities and investments and of the two equal fourth parts of the residuary estate bequeathed in trust for Jenny Schiff and Giustina Rodenberg for life respectively which accrued before January 10, 1920, when the Treaty of Peace with Germany came into force, was not paid to the legatees but was retained by the plaintiffs, and a question arose whether the income accruing since that date ought, having regard to the Treaty of Peace Order, 1919, to be paid to them or was charged by the Order and ought

RUSSELL J. to be paid to the testator's nephews and nieces under clause 23.

1920

SCHIFF,
In re.

The plaintiffs issued an originating summons to determine the question.

HENDERSON

v.
SCHIFF.

Sheldon for the plaintiffs. The question is whether the life interests given to the testator's sisters are caught by the Treaty of Peace Order. He referred to sub-s. (xvi.) of s. 1 of the Order and para. (i) of Art. 297 of the Treaty.

Sir Gordon Hewart A.-G. and *Austen-Cartmell* for the Crown. It cannot be maintained that Jenny Schiff and Giustina Rodenberg were precluded from taking their interests. They became entitled as tenants for life before either the Treaty of Peace or the Treaty of Peace Order, 1919, was made. They took their life interests, but subject to the provisions of the Treaty and the charge created by the Order. But, if that view is not the true one and clause 23 of the will defeats the provisions of the Treaty, then the clause is against public policy.

Meyrick Beebee for Jenny Schiff and Giustina Rodenberg. These legatees are precluded from taking their interests under the will but are entitled to claim compensation for their loss from their own German Government. Alternatively, they are entitled to the benefit of the discretionary trust under clause 25.

Article 297, para. (b), was referred to at the Attorney-General's request.

C. J. Mathew K.C. and *J. V. Nesbitt* for a nephew. The provisions of the will are valid. Under the Peace Treaty and the Order, England collects a common fund and, after deductions have been made under the Clearing Office system, that fund comes into the account with Germany under Art. 243, and ultimately if there is any balance it goes not to individuals pro rata but to the German Government.

[RUSSELL J. On January 10, 1920, were the life interests of the two German ladies absolute or liable to determination ?]

Their life interests then came to an end and the gift over to the non-German nephews and nieces under clause 23 took effect. Clause 23 cannot be against public policy, as it merely shifts

a gift from an enemy to a friend. It is analogous to allowing property to go over on outlawry in old days. If that is not the true view and clause 23 is against public policy, that clause must come out of the will altogether, and clause 25 comes into operation. They referred to para. 4 of the Annex to Art. 298.

RUSSELL
J.
1920
SCHIFF,
In re.
HENDERSON
v.
SCHIFF.
—

Clauson K.C. and *Ashworth James* for a niece. The German ladies were precluded by the Peace Treaty, and thereupon their life interests ceased. There is nothing in clause 23 against public policy.

L. W. Byrne for an infant.

Austen-Cartmell in reply. The bequest in favour of the German ladies took effect on the testator's death. The true construction of the will is that the testator has not divested the gift. When the Peace Treaty came into effect the gift became by force majeure subject to a charge. The Treaty does not divest the title but recognizes it and subjects it to the charge. The legatees are not precluded from taking their interests "as the result of legislation in Great Britain owing to the present war"; whatever way their interests are affected is owing to the Peace Treaty. The beneficiaries are obviously attempting, by giving effect to the will, to defeat the provisions of the Treaty. Clause 23 is against public policy as an attempt by the testator, during a limited period, to impound the property. If clause 25 applies, the result is that some one gets an advantage which the Treaty intended should not be got. Germans are not meant to take until British nationals are paid.

RUSSELL J. [After stating the material provisions of the will and saying that the testator apparently had foreseen what might be the result of war legislation of a certain character passed in this country.] The principal question arises under clause 23, and the Attorney-General contends that the interests of these two ladies who are German nationals did not in any way cease or come to an end by reason of the Treaty of Peace and the legislation following thereon, because they were not, within the terms of

RUSSELL J. 1920
—
SCHIFF,
In re.
HENDERSON v.
SCHIFF.
—

the will, precluded by that legislation from taking an interest under the will. He claims that their life interests continued, but subject to the charge which is created under or by virtue of the Treaty of Peace. In considering the question—which is primarily a question of the construction of clause 23—it is necessary to look at the provisions of the Treaty of Peace.

Sect. IV. of Part X. deals with property, rights and interests, and the important article for the present purpose is Art. 297. It begins in these terms: "The question of private property, rights and interests in an enemy country shall be settled according to the principles laid down in this Section and to the provisions of the Annex hereto." Then para. (b) provides: "Subject to any contrary stipulations which may be provided for in the present Treaty, the Allied and Associated Powers reserve the right to retain and liquidate all property, rights and interests belonging at the date of the coming into force of the present Treaty to German nationals, or companies controlled by them, within their territories," and so forth. "The liquidation shall be carried out in accordance with the laws of the Allied or Associated State concerned, and the German owner shall not be able to dispose of such property, rights or interests nor to subject them to any charge without the consent of that State." Shortly put, that means that private property in this country belonging to German nationals at the date of the coming into force of the Treaty is to be liquidated and the German owner is not to be entitled to dispose of it or subject it to any charge. Then para. (e) is: "The nationals of Allied and Associated Powers shall be entitled to compensation in respect of damage or injury inflicted upon their property, rights or interests, including any company or association in which they are interested, in Germany territory as it existed on August 1, 1914, by the application either of the exceptional war measures or measures of transfer mentioned in paragraphs 1 and 3 of the Annex hereto. The claims made in this respect by such nationals shall be investigated, and the total of the compensation shall be determined by the Mixed Arbitral Tribunal provided for in Section VI.

or by an arbitrator appointed by that Tribunal. This compensation shall be borne by Germany, and may be charged upon the property of German nationals within the territory or under the control of the claimant's State." Then para. (h): "Except in cases where, by application of paragraph (f), restitutions in specie have been made"—para. (f) contains a provision as to restitution in specie where the property is still in existence—"the net proceeds of sales of enemy property, rights or interests wherever situated carried out either by virtue of war legislation, or by application of this Article, and in general all cash assets of enemies, shall be dealt with as follows: (1) As regards Powers adopting Section III. and the Annex thereto, the said proceeds and cash assets shall be credited to the Power of which the owner is a national, through the Clearing Office established thereunder; any credit balance in favour of Germany resulting therefrom shall be dealt with as provided in Article 243. (2) As regards Powers not adopting Section III. and the Annex thereto, the proceeds of the property, rights and interests, and the cash assets of the nationals of Allied or Associated Powers held by Germany shall be paid immediately to the person entitled thereto or to his Government"; and so on. The material provision for the present purpose is (1) because this is a case of Powers which have adopted the Clearing House system. Then, under para. (i) of the same Article, "Germany undertakes to compensate her nationals in respect of the sale or retention of their property, rights or interests in Allied or Associated States." Putting it shortly, the property in this country of German nationals is charged, is to be liquidated, and the proceeds of it are not to be paid to him but they are to be dealt with in the manner provided. The proceeds are to be credited in the account with Germany, and if, at the end of the Clearing Office accounts being taken, there is a credit balance in favour of Germany, then that credit balance is to be disposed of as provided in Art. 243. Looking at that Article, it provides: "The following shall be reckoned as credits to Germany in respect of her reparation obligations:"—that is

RUSSELL
J.

1920

SCHIFF,
In re.

HENDERSON

v.
SCHIFF.

RUSSELL a perfectly wide phrase—" (a) Any final balance in favour of
 J. Germany under Section V. (Alsace-Lorraine) of Part III.
 1920 (Political Clauses for Europe) and Sections III. and IV. of
 SCHIFF, Part X. "—so that any ultimate balance under the Clearing
In re. House Section is to be credited and reckoned as a credit to
 HENDERSON Germany. The result is that the property in this country,
v. belonging to a German national at the date when the Treaty
 SCHIFF. comes into force, is charged, and is to be sold, the proceeds
 — of sale will never reach the German national, the result will
 be that in lieu of the property of the German national there
 will be substituted for it a claim by the German national
 against his own country for compensation. Those are the
 material provisions of the Treaty of Peace.

Then came the Treaty of Peace Act, 1919, which was enacted on July 31, 1919, and provided (s. 1):—" (1) His Majesty may make such appointments, establish such offices, make such Orders in Council, and do such things as appear to him to be necessary for carrying out the said Treaty and for giving effect to any of the provisions of the said Treaty. (2) Any Order in Council made under this Act may provide for the imposition, by summary process or otherwise, of penalties in respect of breaches of the provisions thereof, and shall be laid before Parliament as soon as may be after it is made, and shall have effect as if enacted in this Act." Under that Act the Treaty of Peace Order, 1919, was made and that Order carries out the provisions of the Treaty and makes them statutory to this extent for the purposes of this case. Sect. 1 provides: "1. The Sections of the Treaty set out in the Schedule to this Act shall have full force and effect as law, and for the purpose of carrying out the said Sections the following provisions shall have effect." The sections of the Treaty which are set out in the Schedule, and which are to have the full force of law, include the sections which I have referred to. "The following provisions shall have effect. . . . (xvi.) All property, rights and interests within His Majesty's Dominions or Protectorates belonging to German nationals at the date when the Treaty comes into force"—that is, January 10, 1920—

“ and the net proceeds of their sale, liquidation or other dealings therewith, are hereby charged—(a) in the first place, with payment of the amounts due in respect of claims by British nationals with regard to their property, rights and interests, including companies and associations in which they are interested in German territory, or debts owing to them by German nationals, and with payment of any compensation awarded by the Mixed Arbitral Tribunal, or by an arbitrator appointed by that Tribunal in pursuance of paragraph (e) of Article 297, and with payment of claims growing out of acts committed by the German Government or by German authorities since the thirty-first day of July, and before the fourth day of August, nineteen hundred and fourteen; and (b) secondly, with payment of the amounts due in respect of claims by British nationals with regard to their property, rights and interests in the territories of Austria-Hungary, Bulgaria and Turkey” Then provision (xvii.): “ With a view to making effective and enforcing such charge as aforesaid—(a) no person shall, without the consent of the Custodian, transfer, part with or otherwise deal in any property, right or interest subject to the charge, and if he does so he shall be liable on summary conviction to a fine not exceeding one hundred pounds or to imprisonment for a term not exceeding three months or to both such imprisonment and fine; (b) every person owning or having the control or management of any property, right or interest ” shall give particulars thereof to the Custodian.

As a result of those provisions, which are statutory, it appears to me that a German national in respect of property which he owned in this country at the date of the coming into operation of the Treaty of Peace had that property taken from him in every sense of the word. It was taken from him in the sense that it was charged, it was to be sold, the proceeds were to be applied, first of all in payment of the various matters specified in the Treaty and any ultimate balance there might be on the general Clearing Office fund was to go as a credit to Germany and his right would be that, in lieu of having the property which he had at the

RUSSELL
J.

1920

SCHIFF,
In re.

HENDERSON
v.
SCHIFF.
—

RUSSELL J.
1920
SCHIFF,
In re.
HENDERSON
v.
SCHIFF.
—

date when the Peace Treaty came into operation, he would have substituted therefor a right to claim compensation against his own Government.

Bearing those facts in mind, let me now turn to the clauses of the will. Assume that clause 23 did not appear in the will at all but that these ladies had simply been given life interests in this property and nothing more had been said, what then? It appears clear to me in that case that the result of the legislation in connection with the Peace Treaty would have been to preclude them from taking the interest which the testator had given them under the will. It would be taken from them, it would be sold, and they would receive no part of the proceeds. They would be given a fresh substituted right of claiming compensation against their own Government. Clause 23 provides: "If as the result of legislation in Great Britain owing to the present war any of the beneficiaries under my will who are German subjects are precluded from taking such interests as I have by this my will bequeathed to or for their benefit then I direct that the interests which they would but for such legislation have been entitled to take shall be held by my trustees" upon certain trusts. The effect of that provision, coupled with the previous gift to them of the life interest, is in my opinion this: The testator gives these ladies life interests until the event which he mentions in his will happens, and if and when that event happens then their life interest ceases and the income is payable to other people under the trusts declared in clause 23. The result of that is that, when the Treaty of Peace comes into force, the interest given to them by the will comes to an end under the terms of the will itself. They are no longer entitled to receive the income of the trust funds in question, but, under the express terms of the trusts contained in the will, that income becomes payable to other people. If that be so, there is of course no room or scope for the operation of the Peace Treaty on this property.

Then it is argued by the Attorney-General that that is

an impossible result, because clause 23, if it has that operation, is void as against public policy. I am unable to appreciate exactly upon what ground that argument is based. It appears to me quite open to any persons in this country, if they foresee or anticipate that legislation is going to take place of a certain character, to dispose of their own property upon terms that, until such legislation takes place, A. shall have the enjoyment of the income and, if and when the event happens of such legislation taking place, B. shall enjoy the income. There is no ground here, in my opinion, for saying or suggesting that clause 23 is contrary in any way to public policy. It has been laid down that a person is entitled, not to evade a statute, but to bring about a state of affairs which will not come within the scope or ambit of the statute. In effect Sir Ernest Schiff has thought fit to provide, as regards his own property, that the property shall be payable during the life of German subjects to German subjects unless and until the event happens which would deprive those German subjects of the enjoyment of the property. Upon the happening of that event he has done what, in my opinion, he was entitled to do—namely, provided that the income upon the happening of that event shall be paid to persons other than Germans. Accordingly, in my opinion, the points raised by the Attorney-General, both as to the construction of clause 23 and as to the effect upon clause 23 of the doctrine of public policy, both fail.

The only other clause remaining for consideration in the will is clause 25. In the view I have taken of this case—namely, that the interest given by the will is a life interest determined or defeasible in a certain event—clause 25 does not operate. But there is much to be said for the contention that clause 25, which is in perfectly general terms and not in any way alluding to exceptional legislation, should be given the ordinary operation of such clauses in wills. I see nothing in the circumstances of the present case which would render that clause inoperative if it in fact operated. But, on the view I have taken of the will, it does not apply at all.

The life interest of these ladies has, for the moment, come

RUSSELL
J.
1920
SCHIFF,
In re.
HENDERSON
v.
SCHIFF.
—

RUSSELL to an end and at the present time their interest in the income
 J. has ceased, and has become payable to persons as to whose
 1920 receipt of the income there can be no possible objection. Their
 SCHIFF, life interests are not charged, because they have ceased,
In re. and all their interests under the will, those under clause 4
 HENDERSON and those in the residue, belong at the present time to
 v. and those in the residue, belong at the present time to
 SCHIFF. such of the nephews and nieces and grandniece as are not
 — German subjects.

Solicitors: *Kearsey, Hawes & Wilkinson; Treasury Solicitor;
 Broad & Son; Hair & Co., for Booth, Wade, Farr and Lomas-
 Walker, Leeds.*

A. L.

SARGANT
 J.

In re SLADE.

1920
 June 23.

CREWKERNE UNITED BREWERIES, LIMITED v.
 SLADE.

[1915. S. 1994.]

*Administration—Estate of insolvent Debtor—Loan by Wife for Purposes of
 Business—Subsequent Bond substituting Annuity—Right to prove—Married
 Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 3—Bankruptcy Act,
 1914 (4 & 5 Geo. 5, c. 59), s. 36, sub-s. 2.*

Where a woman lends money to her husband and then accepts from him, in lieu of the money lent, a bond to secure an annuity payable by him for her life, and he subsequently is adjudicated a bankrupt or dies insolvent, she may claim in the bankruptcy, or in the administration by the Court of his estate, for the value of the annuity in competition with the creditors of the husband.

THIS was the hearing of a claim in an action for the administration of Antony Albert Slade, deceased, whose estate was insolvent.

He was married in June, 1900, to the defendant in the action, and was a farmer. Soon after the marriage Mrs. Slade's father gave her 1000*l.*, and this sum she lent to Slade to help him in his farmer's business. No interest was paid on the loan. On August 22, 1910, for some reason which

did not appear, Slade gave his wife a bond for 2000*l*. The bond recited that he had lately agreed with her for the sale to her of an annuity of 40*l*. during her life for the sum of 1000*l*., such annuity to be secured by his bond, and that in pursuance of the agreement she had paid to him 1000*l*., and declared the condition to be that if he should pay to her during her life an annuity of 40*l*. by equal quarterly instalments, the bond should be void.

SARGANT
J.
1920
SLADE,
In re.
CREWKERNE
UNITED
BREWERIES
v.
SLADE.

Mrs. Slade gave evidence that the annuity was regularly paid and that on Slade's death on December 19, 1914, the arrears were only 13*l*. 17*s*.

In October, 1915, Mrs. Slade was prosecuted, and, in order to raise money for her defence, she, in consideration of 50*l*. paid to her by F. G. McDonnell, by deed assigned the bond to him absolutely.

McDonnell claimed to prove in the action for 609*l*. 12*s*., the value of the bond, and arrears of 13*l*. 17*s*. The Master disallowed the claim on the ground that the bond did not alter the character of the loan of 1000*l*., which was money lent or entrusted by Mrs. Slade to her husband for the purpose of his trade or business, within the meaning of s. 3 of the Married Women's Property Act, 1882. (1) McDonnell took

(1) 45 & 46 Vict. c. 75, s. 3: "Any money or other estate of the wife lent or entrusted by her to her husband for the purpose of any trade or business carried on by him, or otherwise, shall be treated as assets of her husband's estate in case of his bankruptcy, under reservation of the wife's claim to a dividend as a creditor for the amount or value of such money or other estate after, but not before, all claims of the other creditors of the husband for valuable consideration in money or money's worth have been satisfied."

Sect. 10 of the Judicature Act, 1875, provides that "in the administration by the Court of the assets of any person who may die after the commencement of this Act and whose

estate may prove to be insufficient for the payment in full of his debts and liabilities . . . the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors and as to debts and liabilities provable . . . as may be in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt."

Sect. 3 of the Act of 1882 so far as it related to England and Wales was repealed by s. 168 of the Bankruptcy Act, 1914, and by s. 36, sub-s. 2, of the same Act it was provided that "where the husband of a married woman has been adjudged bankrupt, any money or other estate of such woman lent or entrusted by her to

SARGANT J. out a summons asking that the Master's certificate might be varied by allowing the claim.

1920

SLADE,

In re.

CREWKERNE

UNITED

BREWRIES

v.

SLADE.

Barrington-Ward K.C. and *Dighton Pollock* for McDonnell.

The bond given by Slade has made the important difference that the claim for money lent is at an end and a new liability is created. The Act of 1882 only refers to money lent, and an annuity does not come within that expression. If the debt, and not the annuity, had been assigned to McDonnell, he would have been postponed to the other creditors: *In re Leng*. (1) But the bond made the wife a specialty creditor, and her assignee is entitled to prove in respect of the annuity, just as a security for money lent to a partnership firm on the terms that the lender shall receive a share of the profits may be enforced although the money lent cannot be "recovered" in competition with other creditors: *Ex parte Sheil*. (2)

[They also referred to *Badeley v. Consolidated Bank*. (3)]

J. Harman for the plaintiffs. The case is within s. 3 of the Act of 1882. The substance of the transaction must be regarded, and the lending of the money and the giving of the bond were both parts of one transaction the basis of which was that the 1000*l.* was lent to the husband for the purpose of his business. That money has never been repaid, and cannot be proved for in competition with the other creditors: *Ex parte Taylor*. (4)

Barrington-Ward K.C. in reply referred to *In re Tuff*. (5)

SARGANT J. I must allow this summons to vary the Master's certificate. The case seems to me to be quite clear. The claimant in the administration of this estate is an assignee of the wife of the deceased in respect of a bond given

her husband for the purpose of any trade or business carried on by him or otherwise, shall be treated as assets of his estate, and the wife shall not be entitled to claim any dividend as a creditor in respect of any such money or other estate until all claims of the other creditors of her husband for valuable con-

sideration in money or money's worth have been satisfied." The Act came into operation on January 1, 1915.

(1) [1895] 1 Ch. 652.

(2) (1877) 4 Ch. D. 789.

(3) (1888) 38 Ch. D. 238.

(4) (1879) 12 Ch. D. 366.

(5) (1887) 19 Q. B. D. 88.

by him to secure an annuity of 40*l.* payable to his wife during her life. The defence to this claim, which succeeded before the Master, is that the wife's assignee, who of course stands on the same footing as the wife, is postponed to the other creditors of the deceased by virtue of s. 3 of the Married Women's Property Act, 1882 [which his Lordship read]. There is no reason to think that when the bond was given the husband was on the verge of insolvency, or that his wife suspected, or had any reason to think, that this was a transaction entered into for the purpose of defeating the general creditors of her husband, or putting her into a better position with regard to the estate than she would have been otherwise. The husband died in 1914; the estate turned out to be insolvent, and the wife, for certain reasons, assigned the annuity to the present claimant. It is perfectly clear that the Act of 1882 would have prevented the wife from claiming in competition with the general creditors of the husband in respect of the original loan of 1000*l.* to her husband. That is undoubted and is not disputed. But, on the other hand, it is equally clear that in the year 1910 the debt was completely put an end to, and that it was impossible for the wife, at any time after that transaction in 1910, to sue the husband for this sum of 1000*l.*, or any part of it; she completely changed the nature of the pecuniary relationship between herself and her husband, and became from that time forward a person merely entitled to the receipt of an annuity during her life of 40*l.* from her husband, or from his estate. In these circumstances, in my judgment s. 3 of the Act of 1882 has no application to this case. The wife, or rather her assignee, is suing merely as an annuitant, claiming for the value of an annuity which was granted for good and valuable consideration; and the mere fact that the origin of the annuity was the sum of 1000*l.* advanced by the wife to the husband is immaterial. *Ex parte Sheil* (1); *Ex parte Taylor* (2); and *In re Tuff* (3), have been referred to. In my judgment, so far as those cases go, they assist the case of the claimant.

SARGANT
J.
1920
SLADE,
In re.
CREWKERNE
UNITED
BREWERIES
v.
SLADE.
—

(1) 4 Ch. D. 789.

(2) 12 Ch. D. 366.

(3) 19 Q. B. D. 88.

SARGANT J. 1920 SLADE, *In re.*
CREWKERNE UNITED BREWERIES v. SLADE.
—

In re Tuff (1), at any rate, shows that s. 3 of the Act of 1882 is not to be extended beyond its language, and there are observations in *Ex parte Taylor* (2) which appear to indicate that, if a new transaction is entered into, the circumstances of the original transaction which brought the original transaction within the section are quite immaterial. Accordingly I must allow the summons to vary, and allow the assignee of the wife to claim in respect of the amounts mentioned—namely, 609*l.* 12*s.* and 13*l.* 17*s.* for arrears.

Solicitors for claimant : *Rawle, Johnstone & Co., for Trevor Davies, McMullen & Bradford, Yeovil.*

Solicitors for plaintiffs : *Sharpe, Pritchard & Co., for Rendall & Co., Yeovil.*

(1) 19 Q. B. D. 88.

(2) 12 Ch. D. 366.

F. E.

GUNSTON *v.* WINOX, LIMITED.ASTBURY
J.

[1920. G. 742.]

1920

[1920. G. 976.]

Nov. 1, 2, 3.

*Design—Registration—Prior Publication—Disclosure to Trader to obtain Order—
No Delivery before Registration—Validity of subsequent Registration—
Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 55.*

Sect. 55 of the Patents and Designs Act, 1907, provides that (a) The disclosure of a design by the proprietor to any other person, in such circumstances as would make it contrary to good faith for that other person to use or publish the design, . . . and (c) the acceptance of a first and confidential order for goods bearing a new or original textile design intended for registration, shall not be deemed to be a publication of the design sufficient to invalidate the copyright thereof if registration thereof is obtained subsequently to the disclosure or acceptance.

Before registering a non-textile design the proprietors submitted it to the Premier Drug Company and obtained a large order. The Drug Company knew of the intended registration, and before any goods were delivered the design was registered :—

Held, that the case fell within clause (a), so that the disclosure to the Drug Company was not a publication and the subsequent registration was valid.

Observations on clause (c).

WITNESS ACTIONS.

These were consolidated actions for infringement of the plaintiffs' registered design.

The plaintiffs were designers of show cards for advertisement purposes and the particular design was a show card for the advertisement of medicated wines. It consisted of a nurse holding a tray containing a bottle and glasses of medicated wine with a blank space on her left cut out in such a shape as to fit an actual bottle standing upright. The design was ornamented with bunches of grapes and contained a panel for the name of the wine or manufacturer. It was registered in Class 5 under the Patents and Designs Acts, 1907 and 1919 (7 Edw. 7, c. 29 ; 9 & 10 Geo. 5, c. 80).

At the close of the evidence the infringement was admitted and the defendants relied solely on the point that the registration was invalid owing to prior publication.

ASTBURY
J.
1920
GUNSTON
v.
WINOX, LD.

The prior publication relied on was as follows: In February, 1920, the plaintiffs, who had previously submitted their design in confidence to the defendants' sales and advertisement manager, but failed to obtain an order, sent the design to their Manchester agent, who submitted it to the Premier Drug Co. as an advertisement show card for Liebig's Standard Wine.

The Drug Company approved of the design and on February 26 the plaintiffs submitted an estimate for 20,000 show cards.

On February 27 the Drug Company wrote accepting the estimate with a small variation in price and adding: "It is also to be understood that we have the copyright of this sketch, and, as arranged with your representative, you will have this done for us, and any small fees in connection therewith we are willing to pay."

On March 2 the plaintiffs wrote acceding to the variation in price and adding "We will write you on the matter of copyright shortly."

On April 19 the plaintiffs having discovered that the defendants were infringing their design commenced the first action basing it on breach of trust or confidence.

On April 24 the plaintiffs wrote to the Drug Company informing them thereof and adding "In the meantime we think it advisable to discontinue our work of reproduction pending the result of the case. We shall be glad to have your approval for so doing."

On May 5 the Drug Company replied agreeing to this suggestion, and no deliveries were in fact made.

Shortly after this a certificate of registration of the plaintiffs' design in Class 5 "as of April 19" the date of the application was issued under the Patents and Designs Acts, 1907 and 1919, and on May 20 a new writ was issued under the Acts and the actions were forthwith consolidated.

Luxmoore K.C. and *Swords* for the plaintiffs. The dealings with the Drug Company did not amount to prior publication.

Sect. 55 of the Patents and Designs Act, 1907, provides ASTBURY
J.
that :—

- “(a) The disclosure of a design by the proprietor to any other person, in such circumstances as would make it contrary to good faith for that other person to use or publish the design, and 1920
GUNSTON
v.
WINOX, LD.
- “(b) The disclosure of a design in breach of good faith by any person other than the proprietor of the design, and
- “(c) the acceptance of a first and confidential order for goods bearing a new or original textile design intended for registration,

shall not be deemed to be a publication of the design sufficient to invalidate the copyright thereof if registration thereof is obtained subsequently to the disclosure or acceptance.”

The correspondence with the Drug Company shows that the whole dealing was subject to an intended subsequent registration and brings the case within clause (a). Compare *Heinrichs v. Bastendorff* (1), a case before the Act.

Micklem K.C. and *W. E. Vernon* for the defendants. Apart from s. 55 there could be no question that the dealing with the Drug Company was an ordinary commercial transaction and amounted to publication : *Blank v. Footman* (2) ; *Winfield v. Snow* (3) ; *Edmunds and Bentwich on Designs*, 2nd ed., pp. 64, 235 ; *Frost on Patents*, 4th ed., vol. 1, p. 127.

Now clause (a) is merely declaratory of the old law and does not apply to ordinary commercial transactions. Clause (b) merely removes Fry J.'s doubt in *Humpherson v. Syer*. (4)

Clause (c) no doubt includes commercial transactions but it is limited to confidential orders for textile designs intended for registration. If clause (a) included confidential orders in commercial transactions clause (c) would be tautologous. This really implies that commercial transactions in non-textile designs are not within the section.

In the present case the Drug Company were no doubt shown the design in confidence in the first instance to see if they

(1) (1893) 10 R. P. C. 160.

(3) (1890) 8 R. P. C. 15, 17.

(2) (1888) 39 Ch. D. 678, 683.

(4) (1887) 4 R. P. C. 407, 414, 416.

ASTBURY J.
 1920
 GUNSTON
 v.
 WINOX, LD.

would give an order. If they had refused, they could not have used or published the design without a breach of confidence. But when once their order was given and accepted the position was changed. The matter became an ordinary commercial transaction. They could have used and probably could have registered the non-textile design without any want of good faith or breach of confidence: *Blank v. Footman* (1); *Winfield v. Snow*. (2)

Luxmoore K.C. in reply. The defendants are attempting to read clause (c) as a proviso to clause (a). But the clauses are quite independent. Statutes may be tautologous: *Hough v. Windus* (3); and the fact that clause (c) is possibly unnecessary does not prevent the Court from giving full effect to the wide language of clause (a).

If the Drug Company had attempted to use or publish the design before registration the Court would have restrained them: *Prince Albert v. Strange*. (4)

ASTBURY J., after stating the facts. It is not now contested that this was a new and original design, that the plaintiffs were the authors, and that if the registration is good the defendants have infringed; but it is alleged that the registration was bad by reason of prior publication to the Drug Company. It is no longer suggested that there was any publication to the defendants' sales and advertisement manager, to whom it is admitted that it was shown in confidence. The sole issue is whether in the circumstances there was such a publication to the Drug Company as to invalidate the plaintiffs' subsequent registration.

In *Blank v. Footman* (1), the inventor of a design showed it to his agent and consulted him thereon. The agent (inter alia) consulted two of his customers at Portsmouth, submitted samples and obtained orders. Kekewich J. held that this amounted to publication, saying: "I cannot understand what meaning to give the words 'previously published' if that is not publication." In that case, so far as one can judge

(1) 39 Ch. D. 678, 683.

(2) 8 R. P. C. 15, 17.

(3) (1884) 12 Q. B. D. 224, 232.

(4) (1849) 1 Mac. & G. 25.

from the report, there was no evidence that the design was shown to those two customers under such conditions as would have made it a breach of confidence for them to have disclosed it. It appears to have been offered to them in the ordinary course of business, and, as such, dealt with by the learned judge. The judgment contains certain dicta (1) as to what may or may not amount to prior publication.

In *Winfield v. Snow* (2), Major, a buyer for Messrs. Olney, suggested to the plaintiffs to produce lace of a certain pattern. The plaintiffs accordingly had a design prepared from which they manufactured a sample of the lace. This was shown to Major, who having approved of it, gave an order on behalf of his employers for 1200 yards, and took away part of the sample. The plaintiffs suggested that the order was conditional on the design being first registered but Major denied this. Hawkins J. held that no such condition attached, and that therefore there was a publication. After stating that Major as soon as he approved the design had dropped his previous character of the plaintiffs' confidential adviser, and continued his interview subsequently as agent for his own employers on whose behalf he dealt with the plaintiffs commercially for 1200 yards of lace, Hawkins J. said: "Having found that the order was unconditional, I am compelled to treat it . . . as an order binding on both parties from the time it was given and accepted, and after that time [Major's employers] might have resold to any of their customers upon the same pattern. When or how the design first came to the knowledge of the defendants is immaterial if the registration is vitiated by prior publication; but in justice to . . . Major and his employers it is but fair to them to say that there is not a suspicion of foundation for imputing to either of them any breach of faith or confidence." That implies that if the design had been disclosed and the order given in confidence and conditionally on the intended registration, there would have been no publication.

In *Heinrichs v. Bastendorff* (3), the owner of a design for

(1) 39 Ch. D. 682.

(2) 8 R. P. C. 15, 17.

(3) 10 R. P. C. 160.

ASTBURY
J.

1920

GUNSTON
v.
WINOX, LD.

ASTBURY J.
1920
GUNSTON
v.
WINOX, LD.
—

a writing table brought an action for infringement. Before registering the design, and while perfecting it, he had consulted a third person with whom he had business relations, and sent him a sample table for his inspection which he returned with slight alterations. The plaintiff then sent him a table requiring no alteration, which was retained and paid for after registration. Day J. held that there was no publication.

In 1907 the Patents and Designs Act of that year was passed, and s. 55 was inserted, as I believe, with the object of cutting down the extent to which negotiations relating to designs intended to be registered should amount to publication especially having regard to certain dicta in previous cases including *Blank v. Footman*. (1) [His Lordship read the section and continued:] The provisions of this section, not being amended in any way by the Patents and Designs Act, 1919 (9 & 10 Geo. 5, c. 80), are still in force. The defendants, with some force, contend that clause (c) must by inference exclude the case of a first and confidential order for goods bearing a new design in cases other than textile. The plaintiffs, on the other hand, contend that, whatever be the negotiations in any particular case before registration, if the circumstances are such that the disclosure of the design by the person to whom it is shown would be contrary to good faith, then, whether there be a confidential order for goods to be subsequently delivered or not, there is no publication. It may be that clauses (a) and (c) overlap. I am not quite sure that I understand exactly what is the true construction to be placed upon clause (c) which is "the acceptance of a first and confidential order for goods bearing a new or original textile design intended for registration." It may refer to cases where the goods have already been manufactured and the design applied, although I doubt whether it can be so limited. The section does not disclose further what is intended by "a first and confidential order." But be this as it may, and whether clauses (a) and (c) do or do not in certain circumstances overlap, I see no reason for cutting

(1) 39 Ch. D. 678, 682.

down the plain and clear language of clause (a)—namely, that “the disclosure of a design by the proprietor to any other person, in such circumstances as would make it contrary to good faith for that other person to use or publish the design” shall not amount to publication.

ASTBURY
J.
1920
GUNSTON
v.
WINOX, LD.

The sole question in the present case therefore, is whether the design was disclosed by the plaintiffs, who for the purposes of this section were unquestionably the proprietors, to the Drug Company in such circumstances as would have made it contrary to good faith for that company to have published or used the design, before the goods were delivered and before time was given for registration. No verbal evidence has been called upon this matter except that of two of the plaintiffs, who say that this design was sent to their Manchester agent to be dealt with in the way I have mentioned. It is, however, clear from the correspondence, that the negotiations between the plaintiffs' Manchester agent and the Drug Company were founded upon and were throughout subject to the condition or understanding that registration should be subsequently applied for. The Drug Company asked that they should have the copyright. The plaintiffs replied that they would deal with that question later on. That is only consistent with both parties negotiating and arranging for this conditional order on the terms that there should be no public use or disclosure of the goods or design before registration. It would therefore have been contrary to good faith had the Drug Company used or published the design before registration, seeing that it was shown or supplied to them solely for the purpose of attempting to negotiate this conditional order.

The case therefore falls within clause (a) and the disclosure to the Drug Company was not a publication. The subsequent registration was therefore valid and the plaintiffs are entitled to an injunction.

Solicitors : *Scatliffs ; Maitland, Peckham & Co.*

G. R. A.

P. O.
LAWRENCE
J.

1920

Oct. 14, 21.

In re MORRIS.

MAYHEW *v.* HALTON.

[1915. M. 613.]

*Revenue—Mortgage—Compound Interest with Annual Rests—Capitalization—
“Interest of money”—Income Tax—Income Tax Act, 1918 (8 & 9
Geo. 5, c. 40), Sch. D, Case III., r. 1 (a); General Rules, 19 (1.), 21.*

By deed dated June 6, 1898, some of the then next of kin of a lunatic for valuable consideration conveyed by way of mortgage their expectancies in the estate of the lunatic to an insurance society subject to redemption on payment to the society of 40,000*l.* at any time after the death of the lunatic with compound interest thereon at the rate of $4\frac{1}{2}$ per cent. per annum with annual rests; and the deed provided that nothing therein contained should render the mortgagors or any of them personally liable for the principal and interest thereby secured but the same should be exclusively charged upon and payable out of the mortgaged premises.

On the death of the lunatic her estate was administered by the Court, and by the order on further consideration the 40,000*l.* was paid to the Society out of funds in Court and sufficient funds were carried over to a separate account to answer the compound interest payable under the deed subject to income tax (if any). The society claimed payment of the compound interest without deduction of income tax on the ground that it had been capitalized:—

Held, that the compound interest had not been capitalized, and was “interest of money” within r. 1 (a) of Case III. in Sch. D to the Income Tax Act, 1918, and that the mortgagors under rr. 19 (1.) and 21 of the General Rules for all the Schedules to the Act were entitled on payment of the interest by way of deduction for income tax to so much of the funds carried over to the separate account as was equal to the income tax in each yearly instalment of interest as and when it became due.

In re Craven’s Mortgage [1907] 2 Ch. 448 followed.

ADJOURNED SUMMONS.

On January 24, 1915, E. A. Morris died, a spinster and intestate, and possessed of very considerable property. For many years before her death the intestate was a lunatic and her next of kin from time to time heavily mortgaged their expectancies in her estate to various insurance and reversionary interest societies. Two of such mortgages were given to the Norwich Union Life Insurance Society (hereafter called the Norwich Union). By the first mortgage dated June 6, 1898, the

mortgagors in consideration of 20,000*l.* paid to them by the Norwich Union conveyed as beneficial owners their respective shares and interests in the real and personal estate of the lunatic to the Norwich Union subject to redemption on payment by the mortgagors at any time after the death of the lunatic to the Norwich Union of the sum of 40,000*l.* with compound interest for the same at the rate of $4\frac{1}{2}$ per cent. per annum from the day of the death of the lunatic with yearly rests. By the second mortgage dated June 4, 1902, the mortgagors in consideration of 10,000*l.* paid to them by the Norwich Union conveyed as beneficial owners their respective shares and interests in the real and personal estate of the lunatic to the Norwich Union subject to redemption on payment by the mortgagors at any time after the death of the lunatic to the Norwich Union of the sum of 21,500*l.* with compound interest for the same at the rate of $4\frac{1}{2}$ per cent. per annum from the day of the death of the lunatic with yearly rests. Both deeds provided that nothing therein contained should render the mortgagors or any of them personally liable for the principal sum and interest thereby secured but the same should be exclusively charged upon and payable out of the mortgaged premises.

Soon after the death of the lunatic this action was commenced to administer her estate and by the judgment dated May 17, 1915, the usual accounts and inquiries in such cases were (*inter alia*) directed; and by the order on further consideration dated October 10, 1919, the principal sums of 40,000*l.* and 21,500*l.* were paid to the Norwich Union out of funds in Court, and certain other funds sufficient to answer the compound interest were carried over to a separate account entitled "The account of the Norwich Union Life Assurance and their mortgagors subject to income-tax (if any)." The compound interest calculated with yearly rests from the death of the lunatic down to January 24, 1920, on the two mortgages amounted to 9580*l.* 19*s.* 3*d.* and 5149*l.* 15*s.* 4*d.* respectively, and the Norwich Union on April 6, 1920, issued a summons asking in substance for a declaration that the mortgagors were not under the mortgages of June 6, 1898, and June 4, 1902,

P. O.
LAWRENCE
J.

1920

MORRIS,
In're.

MAYHEW

v.
HALTON.

P. O.
LAWRENCE
J.

1920

MORRIS,
In re.

MAYHEW
v.
HALTON.

entitled by way of deduction for income tax to any part of the funds so carried over, and for payment out to the applicants of such funds without deduction on account of income tax except in respect of tax payable on the dividends accrued on the funds since they were carried over.

Two other insurance offices and two reversionary interest societies who also held from some of the next of kin mortgages on their expectancies in the lunatic's estate with similar provisions for compound interest also issued summonses for payment to themselves out of the funds in Court of the amounts due to them respectively for compound interest. The five summonses now came on together.

Jenkins K.C. and *J. W. Beaumont* for the Norwich Union. Since 1842 there has been no change in the provisions of the Income Tax Acts which relate to the incidence of income tax, and which are re-enacted in the Income Tax Act, 1918. The question is whether this compound interest has been capitalized by the contract between the parties, or whether it is "interest of money" within the meaning of r. 1 (a) of Case III. in Sch. D, and therefore chargeable to income tax under rr. 19 (1.) and 21 of the General Rules applicable to all the schedules: *Dowell's Income Tax Law*, 8th ed., pp. 524, 586-7. There is nothing illegal in parties agreeing that, if interest is not paid at the end of the year, it shall be converted into principal: *Chambers v. Goldwin* (1); *Rufford v. Bishop* (2); *Tompson v. Leith*. (3) Compound interest is equivalent to capitalization: *Secretary of State for India v. Scoble* (4); *Coote on Mortgages*, 8th ed., pp. 139, 1189-90. Here the parties could have added arrears of interest to capital by a subsequent deed, and they have in effect made the same arrangement ab initio by the proviso for redemption. *In re Craven's Mortgage* (5) will be cited against us, but is distinguishable. There there was a covenant to pay a lump sum, and the point now before the Court was not raised in the

(1) (1804) 9 Ves. 254, 271.

(3) (1858) 4 Jur. (N. S.) 1091.

(2) (1829) 5 Russ. 346.

(4) [1903] A. C. 299.

(5) [1907] 2 Ch. 448, 457-8.

arguments and did not arise for decision, but Warrington J. (as he then was) in his judgment says that an agreement that if principal and interest are not paid at the right time the unpaid interest is itself to bear interest does not effect capitalization. It is submitted that the observation is only a dictum and not binding on this Court. The analogy of the cases where a company capitalizes its surplus profits by the issue of bonus shares which are not assessable as income to super tax applies: *Inland Revenue Commissioners v. Blott*. (1)

P. O.
LAWRENCE
J.
1920
MORRIS,
In re,
MAYHEW
v.
HALTON.

Dighton Pollock, Cecil Turner and Roope Reeve for the other insurance and reversionary interest societies supported this contention.

Hildyard K.C., A. M. Latter and Cyril L. King for the mortgagors. The mere fact that interest carries interest does not make it capital for all purposes. The observations of Warrington J. in *In re Craven's Mortgage* (2) are directly in point. There is here only an agreement to pay compound interest instead of simple interest, and no more, and that does not operate to capitalize the interest and to put an end to the liability to pay income tax. The deeds do not contain the usual provision inserted in mortgages for capitalization of interest in arrear: Key and Elphinstone's Precedents, 10th ed., vol. ii., pp. 29, 30, 133. The mortgagors pay the income tax and are entitled to deduct and retain it from the mortgagees: *London County Council v. Attorney-General* (3); *Sugden v. Leeds Corporation*. (4) We contend that the compound interest is "interest of money" within r. 1 (a) of Case III. in Sch. D., and that under rules 19 (1.) and 21 of the General Rules we are entitled to deduct income tax. The principle of *Inland Revenue Commissioners v. Blott* (1) has no application to this case.

W. Hunt for parties in the same interest adopted the same line of argument.

Jenkins K.C. in reply.

Cur. adv. vult.

(1) [1920] 1 K. B. 114.

(2) [1907] 2 Ch. 448, 457-8.

(3) [1901] A. C. 26.

(4) [1914] A. C. 534.

P. O.
LAWRENCE
J.

1920

MORRIS,
In re.

MAYHEW
v.
HALTON.

Oct. 21. P. O. LAWRENCE J. stated the facts, and said :
The question raised is one which involves the determination of what is the true effect of the provisions of the mortgage of June 6, 1898, upon the relevant provisions of the Income Tax Act, 1918. Although the mortgage was effected over 20 years before the date when the Act came into operation and the interest began to become payable more than four years before that date, counsel have agreed that the relevant provisions of the Act are merely re-enactments of the former Income Tax Acts and have argued the case on that footing. The mortgagors contend that the interest payable under the mortgage of June 6, 1898, is "interest of money" within the meaning of r. 1 (a) of the rules applicable to Case III. in Sch. D to the Act of 1918, notwithstanding that it is compound interest with yearly rests, and they say further that this interest is by virtue of the mortgage deed payable wholly out of profits or gains brought into charge to tax—namely, out of the income of the respective shares of the mortgagors in the estate of the lunatic, and consequently that under r. 19 (1.) of the General Rules applicable to Schs. A, B, C, D, and E to the Income Tax Act, 1918, they are entitled on payment of the interest to the Norwich Union to deduct and retain thereout a sum representing the amount of the tax thereon at the rate or rates of tax in force during the period through which the payment was accruing due.

The Norwich Union, on the other hand, contend that the effect of the mortgage is to capitalize the interest at the end of the first and every subsequent year after the death of the lunatic, and that upon each such capitalization the sum added to capital ceased to be "interest of money" within r. 1 (a) of the rules applicable to Case III., and consequently that r. 19 (1.) of the General Rules has no application, and the mortgagors are not entitled on payment of the compound interest to deduct and retain anything in respect of income tax. It will be seen, therefore, that the sole question to be decided is whether a provision for the payment of compound interest with yearly rests operates to capitalize the interest at the end of each year in such a manner as to make

it cease to be "interest of money" within r. 1 (a) of the rules applicable to Case III. In support of the argument on behalf of the Norwich Union I have been referred to *Chambers v. Goldwin* (1); *Rufford v. Bishop* (2); *Tompson v. Leith* (3); and Coote on Mortgages, 8th ed., pp. 139 and 1188, as showing that a provision for payment of compound interest with yearly rests necessarily involves the capitalization at the end of each year of the prior interest which is then converted into principal and bears interest. It was pointed out that in practice when an account of a principal sum bearing compound interest is made out the method universally adopted is at each rest to aggregate the principal and prior interest, and thereafter to charge interest on the aggregate sum of principal and interest.

In my view, notwithstanding the arguments addressed to me to the contrary, the point is completely covered by the decision of Warrington J. in *In re Craven's Mortgage*. (4) The only distinction suggested by counsel between that case and the present is that in the former the mortgage provided for an aggregation of certain arrears of interest and the capital sum secured upon one occasion only, whereas the mortgage in the present case provides for such an operation at the end of each year from the death of the lunatic. This distinction, so far from telling in favour of the claim put forward by the Norwich Union on the present application, in my judgment tells against that claim, for in my opinion the argument in favour of capitalization in a case where the mortgage in express language directs the aggregation of the principal sum secured and certain specified arrears of interest upon a particular occasion is stronger than in a case where the mortgage provides in general language for payment of compound interest with yearly rests; in the latter case it seems to me to be easier to hold that the compound interest has not ceased to be "interest of money" within the meaning of r. 1 (a) of the rules applicable to Case III. than in the former. The decision in *In re Craven's Mortgage* (4) has stood

P. O.
LAWRENCE
J.

1920

MORRIS,
In re.

MAYHEW
v.
HALTON.

(1) 9 Ves. 254, 271.

(2) 5 Russ. 346.

(3) 4 Jur. (N. S.) 1091.

(4) [1907] 2 Ch. 448.

P. O.
LAWRENCE
J.

1920

MORRIS,
In re.

MAYHEW
v.

HALTON.

unchallenged for more than 13 years, and has in all probability been acted upon in numerous cases. In these circumstances I am relieved from having to form any conclusion of my own, as my clear duty is to follow that decision, which I accordingly propose to do. I have confined my judgment entirely to the compound interest secured by the mortgage of June 6, 1898, but it covers also the compound interest secured by the mortgage of June 4, 1902.

Solicitors: *Collisson, Prichard & Co., for E. Hicks, Norwich; W. J. & E. H. Tremellen, for Blair & Seddon, Manchester; Hammond & Richards; Routh, Stacey & Castle, for Gill, Archer & Co., Liverpool; Tucker, Lake & Lyon, for F. A. Woodcock, Manchester; A. T. Plant.*

H. L. F.

RUSSELL J.

1920

Nov. 2.

In re POWELL.

DODD *v.* WILLIAMS.

[1920. P. 802.]

Will — Construction — Bequest of farming Stock for Life — Keeping up at equal Value.

In a bequest for life of farming stock there is an obligation of, but limited to, keeping it up for the benefit of the remainderman.

Testator, being yearly tenant of a farm, gave all his farming stock to his wife for life "in order that she may if she so desires carry on my farming business, she maintaining and keeping such stock at equal value or as near thereto as circumstances will permit," and after her death to a nephew absolutely. At testator's death in 1894 the stock was valued at 407*l.* 12*s.* 6*d.* At the death of the widow, in 1919, the stock on the farm realized 1349*l.* 1*s.* 11*d.* :—

Held, that the 1349*l.* 1*s.* 11*d.*, less expenses of sale and costs of summons to determine rights, was divisible between the estates of the widow and the nephew (who had died) in the proportion of 941*l.* 9*s.* 5*d.* to 407*l.* 12*s.* 6*d.*

Groves v. Wright (1856) 2 K. & J. 347; *Cockayne v. Harrison* (1872) L. R. 13 Eq. 432; and *Paine v. Countess of Warwick* [1914] 2 K. B. 486 considered and applied.

By will dated August 24, 1886, William Powell after appointing his wife Charlotte and the plaintiff executors

bequeathed "all my farming stock both live and dead unto my said wife for her life . . . in order that she may if she so desires carry on my farming business at Ochran farm or elsewhere she maintaining and keeping such stock at equal value during the carrying on of such business or as near thereto as circumstances will permit and from and after the death . . . of my said wife or in the event of her ceasing or declining to carry on the said business . . . I . . . bequeath the said farming stock unto my nephew John Edward Richards . . . absolutely." He gave his residuary estate on trust for his wife for life and after her death to J. E. Richards.

1920
POWELL,
In re.
DODD
v.
WILLIAMS.

The testator who was yearly tenant of Ochran Farm died on December 27, 1894. At his death the farming stock was valued at 407*l.* 12*s.* 6*d.* His widow became tenant, carried on the farm, paid the rent, and died on September 1, 1919. She did not carry on farming elsewhere. At her death the farming stock live and dead on the farm realized 1349*l.* 1*s.* 11*d.* gross or after deducting auctioneer's charges and expenses 1286*l.* 11*s.* 11*d.*

The surviving executor issued a summons to determine the respective rights of the legal personal representatives of the widow and the legal personal representative of J. E. Richards (who had died in 1916).

Devonshire for the plaintiff.

J. G. Wood for the widow's representative. The widow's estate is entitled to the value of the farming stock existing at the time of her death less only 407*l.* 12*s.* 6*d.*, which alone goes to the nephew's estate: *Steward v. Cotton* (1) in a note to *Vaisey v. Reynolds*. (2) A gift of farming stock will pass growing crops: *In re Roose*. (3) *Vaisey v. Reynolds* (2) where Sir John Leach held that growing crops did not pass has been overruled by *In re Roose*. (3)

D. D. Robertson for J. E. Richards' representative. The whole value of the farming stock goes to the nephew's estate.

(1) (1777) 5 Russ. 17*n.*

(2) (1828) 5 Russ. 12.

(3) (1880) 17 Ch. D. 696.

RUSSELL J. Growing crops are included in live and dead stock. A tenant for life is entitled to crops cut and severed, as against the remainderman. A tenant for life must keep up live and dead stock and any substituted articles become subject to the settlement and pass to the remainderman: *Groves v. Wright*. (1) And not only substituted articles but additions which increase the farming stock pass to the remainderman.

1920
POWELL,
In re.
DODD
v.
WILLIAMS.

[RUSSELL J. Suppose the tenant for life increases the stock fourfold. Is there no limit ?]

No, it all takes the place of what was there formerly; substitution and increase both pass. Whatever was on the farm and satisfied the description of live or dead stock passed here within the meaning of the will on the widow's death to the nephew's estate: *Paine v. Countess of Warwick* (2); *Cockayne v. Harrison* (3); *Myers v. Washbrook*. (4)

[RUSSELL J. The widow may have carried on the farm at a loss and added to what was there out of money of her own. The additions need not have been profits of the farm or the result of her own industry. Do the additions nevertheless pass ?]

Yes.

RUSSELL J. This is largely a question of construction. The question is who is entitled to the net proceeds of sale of the farming stock which was on the farm at the widow's death—whether the widow's estate is entitled to them after making good the sum of 407*l.* 12*s.* 6*d.* to the estate of J. E. Richards or whether J. E. Richards' legal personal representative is entitled to the whole or what part of the proceeds? There was no gift of the farm to the widow, as the testator was only a yearly tenant.

Various authorities have been cited to establish the position of a tenant for life of farming stock. One point is clear from the authorities, that growing crops are included in a gift of farming stock. I say this because here the lists of things sold included crops which had not been severed. A second point

(1) 2 K. & J. 347.

(2) [1914] 2 K. B. 486.

(3) L. R. 13 Eq. 432.

(4) [1901] 1 K. B. 360.

which is clear is, that as between tenant for life and re-
mainderman the tenant for life is entitled to severed crops.
Thirdly, a tenant for life of farming stock must keep it up,
although there is no express direction to him to do so. So much
is established by *Groves v. Wright* (1); *Paine v. Countess of
Warwick* (2); *Cockayne v. Harrison*. (3) And Mr. Robertson
adds that any substituted articles are brought into settlement
and go to the person entitled in remainder. There is no dis-
pute that articles which are substituted for those which have
gone pass to the remainderman, but Mr. Robertson wishes to
go further and seeks to include articles which are not in
substitution for those which have gone but are in addition
to them. If he succeeds in doing that, he in effect makes
the testator dispose of property which is not his own, for he
contends that not only substituted articles but large additions
to the original stock pass to the nephew's estate, and that thus
what are or may be the result of the widow's working and the
fruit of her industry become part and parcel of the testator's
estate and are disposed of by his will. For this he relies on
Groves v. Wright (1), *Paine v. Countess of Warwick* (2); and
Cockayne v. Harrison. (3)

In *Groves v. Wright* (1) Benjamin Wright by will and codicil
dated in 1826 and 1827 respectively devised and bequeathed
farming stock and implements of husbandry and his residuary
real and personal estate to trustees upon trust for his wife for
life if she should continue his widow and unmarried, and
from the decease or marriage of his wife upon further trust
by way of gift over. The wife, who was sole executrix,
entered into possession of all the testator's property and paid
his debts which exceeded the value of the whole property so
given to her for life, including the farming stock and effects.
She, therefore, received no advantage from her husband's
assets; all the farming stock, however, remained unsold,
and she continued therewith to carry on the farm. After-
wards she took additional land adjoining the farm on a lease
in the name of John a son and lived, with the son and two

1920
POWELL,
In re.
DODD
v.
WILLIAMS.

(1) 2 K. & J. 347, 350, 352.

(2) [1914] 2 K. B. 486.

(3) L. R. 13 Eq. 432.

RUSSELL J. daughters, on the farms. By degrees more farming stock was added to that left by the testator to enable her to carry on the larger farm. At her death a bill was filed to carry into execution the trusts of the will and the principal question that arose was to whom the farms and farming stock belonged. There Wood V.-C. said: "The effect of the transactions seems to be, that the widow remained at the time of her death the owner of the farm; and that John Wright was her bailiff, giving his services for the benefit of his mother and sisters and himself, who were all living upon this property, and were, during the widow's life, supported by means of it; and I think, that, when the additional farm was taken, it was taken by the widow, and, as it was stocked by her, I must hold that the stock, as well as the farm, was hers." So he held that the additional farm belonged to the widow. Then he continues: "The legal points which arise upon these facts are peculiar, and present more difficulty. The first question is on the effect of the bequest of farming stock to the widow for life, and a direction, that, after her death, the whole should be sold, without any direction for carrying on the business. I cannot think that the doctrine relating to things quæ ipso usu consumuntur, can have any application to a gift of farming stock. . . . Here, farming stock was given for the benefit of the testator's widow for life. She could not personally use it so as to consume it; the only use she could so personally make of it would be to sell it. By such a bequest, the testator must, I think, have intended that his widow should have the use of the stock, contemplating that she would carry on the business of the farm with it. She might have allowed the stock to be sold, and have taken the income of the produce for life, leaving the capital to the legatees in remainder; or if not, I must suppose that the testator contemplated that she would carry on the business; and if, in the course of such business, it was necessary that any part of the farming stock should be sold, then the substituted stock would follow the course of the original subject of the bequest." There is no justification in that passage for imputing to the Vice-Chancellor a meaning that anything more than substituted articles would

1920
POWELL,
In re.
DODD
v.
WILLIAMS.
—

pass. Far from it being an authority in support of the proposition that a large increase in the original subject-matter of the bequest would pass, what the Vice-Chancellor says is expressly confined to substituted stock. Then he goes on : "Then the difficult part of the case is this : The widow, being entitled to use this farming stock during her life for her own benefit, would of course be entitled to all the profits which she made by such use. She seems to have found the farm business profitable, and she extended it ; and instead of 60 acres, I find that she occupied 240 acres. Would it be just that the fruits of her personal labour should be added to the estate of the testator, when, certainly, if she had invested it in the funds, no one could say it was not her own ?"

1920
POWELL,
In re.
DODD
v.
WILLIAMS.

Paine v. Countess of Warwick (1) which I next refer to affords no justification for saying that anything more than substituted stock passes. That was a case between trustees and an execution creditor. A judgment had been recovered by the plaintiff against the Countess of Warwick and the sheriff in execution of the judgment had seized, with other things, a herd of deer in the park of Easton Lodge of which Lady Warwick was tenant for life under the will of Lord Maynard. By that will Lord Maynard bequeathed to trustees all his furniture and effects, live and dead stock including deer, and all other articles and things in or about Easton Lodge, upon trust to permit the same to be held and enjoyed by the person for the time being entitled to the possession of Easton Lodge. Under that provision Lady Warwick was tenant for life. At the date of the will the herd consisted of 600 head, some being red deer but mostly fallow. At the time of the seizure there were about 400 red deer and 30 fallow. So the numbers of the herd had not been maintained. From time to time purchases had been made by the tenant for life of bucks and does which had been added to the herd, but all the deer existing at the date of the will and also all those purchased were dead. Whether any of the deer seized by the sheriff were the progeny of those purchased, it was impossible to say. The trustees claimed to be entitled to

(1) [1914] 2 K. B. 486, 489.

RUSSELL J. the deer. Pickford J., after stating the terms of the will, says :

1920
 POWELL, *In re.*
 DODD
v.
 WILLIAMS.
 —

“ The question is whether the herd of deer at present in the park is subject to the trusts of that will. It was contended in the first place that tame deer belong to the class of things quæ ipso usu consumuntur, and that therefore the tenant for life is absolutely entitled to them and the gift over is bad ; and secondly that, owing to the fact that additions to the herd had been made by the tenant for life, it was impossible for the trustees to show which if any of the present deer were the descendants of the deer existing at the testator’s death. If the first question is to be decided in favour of the execution creditor there is an end of the case, but if otherwise the effect of the purchases of fresh deer by Lady Warwick has to be considered. Upon the first question a number of authorities were cited, some of which are a little difficult to reconcile with others, but I do not feel called upon to express any opinion upon them, because upon this point the case seems to be covered by authority, Bacon V.-C. having in 1876 in a case of *Maynard v. Gibson* (1) decided under this very will that Lady Warwick as tenant for life did not take the deer absolutely but was only entitled to the reasonable use and enjoyment of them. . . . On the second question I think the case of *Maynard v. Gibson* (1) also covers the present case, for Bacon V.-C. held that the herd of deer stood on the same footing as the farming stock and implements of husbandry in the case of *Groves v. Wright* (2), with reference to which Wood V.-C. said : ‘ If in the course of such business it was necessary that any part of the farming stock should be sold then the substituted stock would follow the course of the original subject of the bequest ’—in other words, that the life tenant was bound to keep up the stock. If that principle is, as Bacon V.-C. seems to have held, to be applied to a herd of deer, Lady Warwick was bound to keep up the herd, and the fresh deer which she purchased and added to the herd became subject to the trusts of the will.” She had not kept up the herd to its original numbers but so far as she had kept it up the fresh deer which she had added to the herd passed.

(1) [1876] W. N. 204.

(2) 2 K. & J. 347.

Paine v. Countess of Warwick (1), in my opinion, carries the matter no further than *Groves v. Wright* (2) but supports the view that the tenant for life must keep up the subject-matter of the bequest and that only what is substituted passes to the remainderman.

RUSSELL J.
1920
POWELL,
In re.
DODD
v.
WILLIAMS.

Cockayne v. Harrison (3) is to the same effect. The headnote is: "A gift for life of a business and stock in trade confers only a life interest in such part of the stock in trade as consists of consumable articles. *Secus*, where the gift is of consumable articles, without any reference to trade or business." The case is short and Romilly M.R. said: "The question in this case is as to the effect of a gift for life of perishable articles, which cannot be used without being consumed. . . . I am disposed to think, after looking at all the cases, and particularly at that of *Groves v. Wright* (2), that the rule cannot be considered as quite settled; but I think that the distinction which I took in *Phillips v. Beal* (4) is sound, and that I ought to follow that decision. Here is a gift for life of farming stock which is made in connection with a gift for life of the business, the stock being necessary to carry on the business; and I think that under these circumstances the legatee is bound to keep up the stock, and further, that if, for any reason, it is sold off and the business discontinued, she only takes a life interest in the proceeds."

Thus, it seems to me that the authorities go no further than this, that in a bequest to a person for life of farming stock there is an obligation on the life tenant to keep up the stock for the benefit of the person entitled in remainder. In my opinion the obligation does not go beyond that, and, at the death of the life tenant, to that extent only the stock passes under the testator's will. The obligation does not go further and in effect allow the testator to dispose of another person's, that is, the life tenant's property. The testator here has accurately described what he means to give—farming stock live and dead, with an obligation on the tenant for life to keep it up to a particular value.

(1) [1914] 2 K. B. 486.

(2) 2 K. & J. 347.

(3) L. R. 13 Eq. 432, 433.

(4) (1862) 32 Beav. 25.

RUSSELL J. The widow has kept it up to that value. The value at 1920 testator's death was 407*l.* 12*s.* 6*d.*, and at the death of POWELL, the tenant for life the stock on the farm amounted in value *In re.* (after deduction of auctioneer's charges and expenses) to DODD 1286*l.* 11*s.* 11*d.* It seems to me a startling thing to say in *v* those circumstances that the testator had power to dispose WILLIAMS. of the difference between those values, to dispose in effect of property which the widow, the life tenant, had put on the farm—and for which she had no doubt paid out of the profits she had made—beyond the value of 407*l.* 12*s.* 6*d.* I am asked to hold that the whole value of stock at the death of the tenant for life passes under the testator's will to the nephew's estate. I cannot see any justification in the authorities for so holding, and I decide that the nephew's estate is entitled only up to the value of 407*l.* 12*s.* 6*d.* It is noteworthy that, when the items of farming stock at the testator's death are compared with those at the death of the widow, the stock is found to have been increased in several ways. For instance, at the testator's death the sheep numbered forty; at the widow's death, they numbered nearly eighty. There was also an increase of crops. The widow had carried on the farm and added to the farming stock. I am glad to feel that I am not justified in taking away from her the fruits of her industry, beyond the 407*l.* 12*s.* 6*d.* There will be a declaration that the 1286*l.* 11*s.* 11*d.* less costs is divisible between the representatives of the widow and the representative of J. E. Richards in the proportion of 941*l.* 9*s.* 5*d.* to 407*l.* 12*s.* 6*d.*

Solicitors : *Hopgood, Mills, Steele & Co., for Gabb, Price & Fisher, Abergavenny ; G. S. Warmington & Edmonds.*

A. L.

In re HARCOURT.VISCOUNT PORTMAN *v.* PORTMAN.

[1920. H. 1325.]

EVE J.

1920

Oct. 27, 28;
Nov. 12.

Heirlooms—To go and be held with Mansion House—"So far as the rules of law and equity will permit"—"To be held and enjoyed accordingly"—Shifting Clause in Settlement of Mansion House—Tenant in Tail—Vesting at Birth—Rule against Perpetuities.

By a will, dated in 1872, a testatrix devised an estate and mansion house to trustees upon trust for her niece for life with remainder to the first son of her niece born in the testatrix's lifetime who should not be entitled to a certain Barony for life with remainder to his sons and in default of sons his daughters severally and successively according to seniority in tail with remainder in tail for every other son of the niece born in the testatrix's lifetime so that every such son should take an estate for life with remainder to his sons and in default of sons his daughters severally and successively according to seniority in tail with remainder to every son of her niece born after the death of the testatrix severally and successively according to seniority in tail with remainder over. The will also contained a shifting clause providing that if any son or remoter issue of the niece should succeed to the Barony after becoming entitled in possession to the estate, then the trust declared for the benefit of the son or remoter issue so becoming entitled and of his issue male and female should cease and determine and the estate go over as if he were dead without issue of his body.

By his will, dated in 1874, the testatrix's husband settled chattels "to go and be held so far as the rules of law and equity will permit with the mansion house . . . as heirlooms, and to be held and enjoyed accordingly on succession by the several persons who shall be respectively entitled for the time being, to hold and enjoy the said mansion house"; and other chattels "to go as heirlooms so far as the rules of law and equity will permit with" the estate.

On the death of the niece in 1899 her second son succeeded to the property as tenant for life, and he had a daughter born in 1903 who thereupon became tenant in tail in remainder. In 1919 he succeeded to the Barony and the estate and mansion house then passed by virtue of the shifting clause to the third son for life with remainder to his eldest son in tail:—

Held, that the chattels had vested absolutely in the child of the second son as tenant in tail in remainder at birth, there being nothing in the settlement of the chattels to postpone vesting until actual possession of the settled estate and mansion house.

In re Lord Chesham's Settlement [1909] 2 Ch. 329 distinguished.

Foley v. Burnell (1783) 1 Bro. C. C. 274 applied.

Held, also, that the shifting clause was void as regards the chattels by

EVE J.
 1920
 HARCOURT,
In re.
 VISCOUNT
 PORTMAN
v.
 PORTMAN.

reason of its transgressing the rule against perpetuities, and that the use of the words "so far as the rules of law and equity will permit" in the settlement of the chattels did not avail to prevent this.

Christie v. Gosling (1866) L. R. 1 H. L. 279, 290 applied.

Countess of Harrington v. Earl of Harrington (1871) L. R. 5 H. L. 87 explained.

ADJOURNED SUMMONS.

By her will dated May 23, 1872, Lady Catherine Julia Harcourt appointed devised and bequeathed the Buxted Park estate (subject to the life interest therein of her husband, Colonel Francis Vernon Harcourt) to trustees upon trust to pay the rents and annual proceeds thereof to her niece Mary Selina Charlotte, the wife of the Honourable William Henry Berkeley Portman, who was the eldest son of the first Baron Portman, for life for her separate use without impeachment of waste, and from and after her decease "in trust for the first or only son of my said niece born in my lifetime who shall not, at the decease of my said niece, be entitled in possession or in remainder immediately expectant on the decease of the survivor of the said Lord Portman and William Henry Berkeley Portman to their family Barony of Portman, and from and after his decease in trust for his first and every other son severally and successively according to seniority in tail with remainder in trust for his first and every other daughter severally and successively according to seniority in tail with remainder in trust for every other son of my said niece born in my lifetime, other than a son for the time being entitled in possession or in remainder immediately expectant on the decease of the survivor of the said Lord Portman and William Henry Berkeley Portman to the said Barony, and the issue of every such son so that every such son may take an estate for his life without impeachment of waste with remainder to his first and every other son severally and successively according to seniority in tail with remainder to his first and every other daughter severally and successively according to seniority in tail, with remainder to every son of my said niece born after my decease other than a son for the time being entitled in possession or in remainder as aforesaid to the said Barony severally and successively according to

seniority in tail" with divers remainders over. The will also contained the following shifting clause: "Provided always and I declare that if any son or remoter male issue of my said niece who by virtue of the limitations herein contained shall be or become entitled in possession to the said estate and hereditaments, shall become entitled in possession to the said Barony, then the trust hereby declared for the benefit of the son or remoter issue becoming entitled in possession to the said Barony and of his issue male and female shall cease and determine as if he were dead without issue of his body, and then and thenceforth the said hereditaments shall go and be in trust for such person or persons as by virtue of the limitations herein contained would then be entitled as the person or persons next in remainder to the same hereditaments, in case such son or remoter issue so becoming entitled to the said Barony were then dead without issue of his body."

By his will, dated January 3, 1874, the testatrix's husband Colonel Harcourt (in the event which happened of his surviving his wife) gave and bequeathed the Sevres china flower-stand given to the Earl of Liverpool by Napoleon and certain water-colour drawings "to go and be held so far as the rules of law and equity will permit with the mansion house called Buxted Park as heirlooms and to be held and enjoyed accordingly in succession by the several persons who shall be respectively entitled for the time being to hold and enjoy the said mansion house." He also gave and bequeathed his plate and plated articles and linen to trustees upon trust (after the death of his wife) "to permit all such plate and plated articles as are marked with an Earl's coronet or with the arms or crest of the Jenkinson or Medley families and also all linen belonging to my said mansion house at Buxted to go as heirlooms so far as the rules of law and equity will permit with the Buxted Park Estate." And he further gave and bequeathed "all the household goods furniture books pictures and china which shall be . . . in or about my said mansion house called Buxted Park . . . at the time of my decease" to his trustees "in trust to permit the said household goods furniture books pictures and china . . . to go and

EVE J.
1920
HARCOURT,
In re.
VISCOUNT
PORTMAN
v.
PORTMAN.

EVE J. be held so far as the rules of law and equity will permit with ”
 1920 the mansion house “ as heirlooms according to the limitations
 HARDCOURT, thereof which shall be subsisting under this my
In re. will or otherwise howsoever at the time of my decease and to
 VISCOUNT be held and enjoyed accordingly in succession by the several
 PORTMAN persons who shall be respectively entitled for the time
 v. being to hold and enjoy the said ” mansion house.
 PORTMAN.

The testatrix died on December 5, 1877, and her husband died on April 23, 1880. The Buxted Park estate then passed for her life to the testatrix's niece Mary Selina Charlotte the wife of William Henry Berkeley, who became second Baron Portman on the death of the first Baron in 1888. She died on January 3, 1899, leaving her husband and five children, all of whom were born in the lifetime of the testatrix. The eldest son Edward William Berkeley being the person entitled in remainder expectant on the death of his father to the Barony did not succeed to the Buxted Park estate, but it passed on the death of his mother to the second son the plaintiff Henry Berkeley Portman under the appointment in the will. The second Lord Portman died in 1919, but in the meanwhile his eldest son had died in 1911 without leaving male issue, and the Barony accordingly devolved on the plaintiff Henry Berkeley Portman now Viscount Portman. Thereupon the shifting clause in the testatrix's will came into operation, and in accordance with the decision of Eve J. in *In re Harcourt ; Fitzwilliam v. Portman* (1) the Buxted Park estate passed to the third son the defendant Claude Berkeley Portman for life with remainder to his first and every other son severally and successively according to seniority in tail with remainder to the first and every other daughter successively according to seniority in tail with remainders over. The defendant Edward Claude Berkeley Portman is the eldest son of the defendant Claude Berkeley Portman.

This summons was taken out by Viscount Portman and his only child Selina Lusie Portman to have it determined whether on the true construction of the will of Colonel Harcourt the chattels thereby bequeathed to go and be held so far as

(1) [1920] 1 Ch. 493.

the rules of law and equity would permit with the mansion house called Buxted Park or with the Buxted Park estate as heirlooms as therein mentioned belonged to the Viscount for life with remainder to his daughter absolutely or to some other and if so what persons and for what estates and interests.

EVE J.
1920
HARCOURT,
In re.
VISCOUNT
PORTMAN
v.
PORTMAN.

Romer K.C. and *H. T. Methold* for the plaintiffs. The first question is who are now entitled to the chattels settled as heirlooms by the will of Colonel Francis Vernon Harcourt? We submit that Selina Lusie, the daughter of the first plaintiff, the present Lord Portman, becomes entitled absolutely to these chattels as first tenant in tail of the Buxted Park estate, expectant on the death of her father, and also subject to her interest being divested in the event of a brother being born. It is a question whether this case is governed by *In re Lord Chesham's Settlement* (1) or comes within the rule in *Foley v. Burnell*. (2)

There was a disposition of heirlooms in similar words in *In re Beresford-Hope* (3), which was a case of an executory trust. Here it is an executed trust. In *Foley v. Burnell* (2) the words were very like those in the present case, and the rule there laid down that chattels settled as heirlooms with real estate vest absolutely in the first tenant in tail in esse has been followed ever since, except in cases where there are express words to prevent the vesting in any tenant in tail who does not attain twenty-one years of age or come into actual possession of the settled property. In *In re Lord Chesham's Settlement* (1) the Court of Appeal held that there was sufficient indication on the part of the settlor that the heirlooms should vest only in a tenant in tail male in possession. That decision came as a surprise to the profession and, it is submitted, will only be followed where the words are identical. It has been distinguished in various cases such as *In re Parker* (4); *In re Beresford Hope* (3); and *In re Lewis*. (5)

(1) [1909] 2 Ch. 329.

(3) [1917] 1 Ch. 287.

(2) 1 Bro. C. C. 274.

(4) [1910] 1 Ch. 581.

(5) [1918] 2 Ch. 308.

EVE J. The language of the three gifts of chattels in the present case varies, but all are either to go and to be held with the mansion house called Buxted Park, and "to be held and enjoyed accordingly," or "to go with the Buxted Park estate," and come within the rule in *Foley v. Burnell*. (1) They therefore vest in the second plaintiff as the first tenant in tail in esse.

1920
HARCOURT, *In re.*
VISCOUNT
PORTMAN
v.
PORTMAN.

The second question which arises is what is the effect of the shifting clause in the will of the testatrix upon these chattels? We say that the shifting clause is altogether void as infringing the rule against perpetuities. It is an attempt to make a gift over of chattels in an event which may be too remote. It is valid as to the real estate, which can be barred on the majority of the tenant in tail. In an executed trust the Court will look at what may happen, and here the chattels may pass to one outside the limits of the rule as to perpetuities. The shifting clause must therefore be disregarded altogether. It cannot be made divisible as in *Miles v. Harford* (2), where the trust was executory and was of leaseholds.

Maugham K.C. and *F. Whinney* for the first defendant and his son. This case cannot be distinguished from *In re Lord Chesham's Settlement* (3), which has never been overruled. It is well settled that the vesting of chattels can be postponed by apt words until actual possession. In *In re Lord Chesham's Settlement* (3) the heirlooms were settled upon trust to be "used held and enjoyed with the mansion house" by the persons for the time being "entitled to the said mansion house," and it was held that they did not vest in a tenant in tail who never lived to obtain actual possession of the mansion house. Here the words used point more clearly to the need for actual possession. Other examples where the ordinary rule of *Foley v. Burnell* (1) was held not to apply are *Lord Scarsdale v. Curzon* (4), where the words were "seised of or entitled to the actual freehold"; *Potts v. Potts* (5), where they

(1) 1 Bro. C. C. 274.

(3) [1909] 2 Ch. 329.

(2) (1879) 12 Ch. D. 691.

(4) (1860) 1 J. & H. 40.

(5) (1848) 1 H. L. C. 671.

were "become seised"; *In re Angerstein* (1), where they were "actual possession"; and *In re Fothergill's Estate* (2), where they were "in the actual possession or entitled to the receipt of the rents and profits" of the settled estate. In *In re Fowler* (3) Peterson J. followed *In re Lord Chesham's Settlement* (4) without qualification. In the present case the words of enjoyment relate to the description of the person who is to enjoy the chattels with the mansion house. *In re Lord Chesham's Settlement* (4) was distinguished in *In re Beresford-Hope* (5), where the word "entitled" was held to refer only to possession in title; and *In re Parker* (6), where the heirlooms were to go to the persons who succeeded to a house, and this following *In re Cresswell* (7) was held to refer to succeeding in title. The only case where on words closely resembling those in *In re Lord Chesham's Settlement* (4) a contrary decision was arrived at is *In re Lewis*. (8) But the distinction drawn there does not exist here.

But even if the chattels vested at birth absolutely in the first tenant in tail, it would be "subject . . . to his interest being defeated by any event which would defeat his estate in the realty": *In re Parker*. (9) The shifting clause is valid as regards the realty, and it ought to be construed so as to be valid as regards the chattels: *Pelham v. Gregory* (10); *Martelli v. Holloway* (11); *Christie v. Gosling*. (12) See also *In re Earl of Stamford and Warrington* (13), and Fearn on Contingent Remainders, 10th ed., vol. i., p. 522. But even if it should be held that the shifting clause, when applied to personalty, infringed the rule against perpetuities, effect must be given to the words in the settlement of the chattels "so far as the rules of law and equity will permit." The shifting clause must in view of these words only be applied to the chattels to the extent permitted by the rule against perpetuities;

EVE J.
1920
HARCOURT,
In re.
VISCOUNT
PORTMAN
v.
PORTMAN.
—

(1) [1895] 2 Ch. 883.

(2) [1903] 1 Ch. 149.

(3) [1917] 2 Ch. 307.

(4) [1909] 2 Ch. 329.

(5) [1917] 1 Ch. 287.

(6) [1910] 1 Ch. 581.

(7) (1883) 24 Ch. D. 102.

(8) [1918] 2 Ch. 308.

(9) [1910] 1 Ch. 581, 584.

(10) (1760) 3 Bro. P. C. 204.

(11) (1872) L. R. 5 H. L. 532.

(12) L. R. 1 H. L. 279.

(13) [1912] 1 Ch. 343.

EVE J. see as to the controlling effect of these words *Countess of Harrington v. Earl of Harrington*. (1)
 1920
 HARDCOURT, *Romer K.C.* in reply. "Doubtful words tending to restrict
In re. the interest in the chattels to those who come into possession
 VISCOUNT of the real estate, will not overrule the operation of the general
 PORTMAN canons of construction." That is the fourth rule stated as
 v. applicable to cases like the present in *Lord Scarsdale v. Curzon*. (2) It was originally laid down in *Foley v. Burnell* (3), a case closely resembling this present one. *In re Lord Chesham's Settlement* (4) is distinguishable. Again there is no ground for the suggestion that, because a shifting clause is valid as regards realty, it will receive a limited construction when applied to personalty settled to accompany the realty. On the contrary the importance of inserting express provisions limiting or preventing the application of a shifting clause to personalty is insisted on in the text-books. Compare Key and Elphinstone's *Precedents of Conveyancing*, 10th ed., vol. ii., p. 785*n*, and Lewis on *The Law of Perpetuity*, pp. 645, 646. Indeed this is assumed in *Miles v. Harford*. (5) A tenant in tail can disentail the realty but this will not affect the personalty. Lastly, the words "so far as the rules of law and equity will permit" will not prevent the application of the shifting clause to the personalty, so as to render it void for perpetuity, seeing that an executed and not an executory trust is in question: *Christie v. Gosling* (6) and Jarman on *Wills*, 6th ed., vol. i., p. 696. *Countess of Harrington v. Earl of Harrington* (1) is not an authority to the contrary when carefully examined. See also *Lord Dungannon v. Smith* (7) and *Tollemache v. Earl of Coventry*. (8)
Cur. adv. vult.

Nov. 12. EVE J. read the following judgment. The question raised by this summons relates to the ownership of certain valuable pictures, plate, furniture and other chattels bequeathed by the will of the late Colonel Francis Vernon

(1) L. R. 5 H. L. 87, 100, 102.

(2) 1 J. & H. 40.

(3) 1 Bro. C. C. 274.

(4) [1909] 2 Ch. 329.

(5) 12 Ch. D. 691.

(6) L. R. 1 H. L. 279, 290.

(7) (1846) 12 Cl. & F. 546.

(8) (1834) 2 Cl. & F. 611.

Harcourt, in language to which I shall hereafter more particularly refer, to go and be held so far as the rules of law and equity permit as heirlooms with a mansion house and estate known as Buxted Park. [His Lordship then stated the terms of the devise of Buxted Park in Lady Catherine Julia Harcourt's will and continued:] The testatrix died in 1877, her husband in 1880, her niece in 1899. On the death of the niece the first-named plaintiff succeeded to Buxted Park as tenant for life. His only child the second plaintiff, Selina Lusie Portman, was born in 1903. In October, 1919, the first-named plaintiff succeeded to the Barony of Portman, and thereupon by virtue of a shifting clause contained in the will of the testatrix, whereby it was declared that the trust for the benefit of any son or remoter issue of her niece becoming entitled in possession to the Barony and of his issue male and female should cease and determine upon his becoming entitled in possession to the Barony, as if he were dead without issue of his body, the Buxted Park estate went over so as to be held in trust for the defendant Claude Berkeley Portman for his life with remainder to his first and every other son severally and successively according to seniority in tail with remainder to his first and every other daughter severally and successively according to seniority in tail with remainders over. The defendant Edward Claude Berkeley Portman is the eldest son of the defendant Claude Berkeley Portman and was born in 1898.

In these circumstances the first question I have to decide is whether according to the true construction of the will of the testator the chattels vested absolutely in the second plaintiff who on her birth became entitled under the will of the testatrix to the Buxted Park estate and mansion house for a vested estate of inheritance in remainder expectant on the death of her father subject to defeasance in the event of a brother being born, or whether she takes no interest therein by reason of the fact that she can never come into actual possession of the settled property.

The language in which the testator deals with the three categories of chattels bequeathed as heirlooms differs in each case. [His Lordship read the bequests.] Does the language

EVE J.
1920
HARCOURT,
In re.
VISCOUNT
PORTMAN
v.
PORTMAN.

EVE J. of these bequests or any of them manifest an intention on
 1920 the part of the testator that, contrary to the general rule
 HARCOURT, that chattels settled as heirlooms with real estate vest abso-
In re. lutely in the first tenant in tail in esse, these chattels shall
 VISCOUNT not vest in any tenant in tail who does not come into actual
 PORTMAN possession of the mansion house?
 v.
 PORTMAN.

It is admitted that the intention must be expressed in reasonably clear and certain terms, and it is argued that the words to be found in the first and third gifts "to go and be held with the mansion house as heirlooms and to be held and enjoyed accordingly in succession by the several persons who shall be respectively entitled for the time being to hold and enjoy the said mansion house" fulfil that condition. Emphasis is laid in particular upon the phrases "to be held and enjoyed" and "entitled to hold and enjoy" and the context in which they occur, and it is insisted that the terms employed indicate a clear intention on the testator's part to defeat the interest of a tenant in tail who does not come into actual possession of the property.

Were the matter free from authority I am not prepared to say that the language might not be construed as importing into the gifts the condition of actual possession of the mansion house. A testator who bequeaths chattels to be held and enjoyed by the persons for the time being entitled to hold and enjoy the mansion house might well be said to have contemplated a concurrent physical enjoyment of both and to have indicated a sufficient intention not to allow the enjoyment of the one to be divorced from the enjoyment of the other within the limits of the rule against perpetuities. But in these cases, before holding that the legal principle long established for regulating gifts of chattels as heirlooms with settled real estate is not to be applied to a particular bequest, it is, in my opinion, essential to find in the particular bequest language substantially differing from that used in other cases to which the principle has been held applicable. In *In re Lord Chesham's Settlement* (1) the Court of Appeal came to the conclusion that the words "with the mansion house"

following the words "to be used held and enjoyed" in the bequest were an essential part of the trust affecting the chattels, and that their use and enjoyment without restriction as to the place of enjoyment would be a breach of trust and involve the destruction of an essential part of the trust. On this construction the Court held that the chattels could only be taken as part of or, at least, as annexed to the mansion house, and accordingly that a tenant in tail who died before coming into actual possession of the mansion house was excluded from all interest in the chattels.

EVE J
1920
HARCOURT,
In re.
VISCOUNT
PORTMAN
v.
PORTMAN.

In the present case it is true we have the direction that the chattels are to go and be held with the mansion house as heirlooms, but the expression "with the mansion house" is not repeated after the words "to be held and enjoyed" and cannot I think be implied from the use of the word "accordingly." That may be read as if it preceded the words "to be held and enjoyed" instead of following them, or if it refers to any antecedent it would naturally be to the last antecedent "as heirlooms."

The decision in *In re Lord Chesham's Settlement* (1) has been subjected to some trenchant criticism, but this would not absolve me from the obligation of following it if I thought the language of this testator brought these bequests within its authority. I do not think it does. I think these bequests are couched in terms much more nearly approaching those employed in the will dealt with in the leading case of *Foley v. Burnell*. (2) I can see no material difference between the words "to be held and enjoyed by the persons entitled to the use and possession" and the words I have here to deal with. In my opinion the rule established by *Foley v. Burnell* (2) and applied in a great number of subsequent cases applies here and subject to the question as to the effect of the shifting clause contained in the will of the testatrix the chattels have vested in the second plaintiff subject to her father's life interest therein and subject to being divested in the event of a brother being born.

The question then arises whether the respective interests

(1) [1909] 2 Ch. 329.

(2) 1 Bro. C. C. 274.

EVE J. 1920
 HARCOURT, *In re*.
 VISCOUNT
 PORTMAN
 v.
 PORTMAN.

of the plaintiffs are subject to the provisions of the shifting clause contained in the will of the testatrix. It is contended that they are not, inasmuch as the clause is void as regards the personalty by reason of its transgressing the rule against perpetuities. I need not repeat the limitations of the real estate; I have already stated them down to the remainder to every son of the niece born after the decease of the testatrix severally and successively according to seniority in tail, and it cannot be denied that a settlement of personalty upon trusts corresponding as near as may be to these limitations would be void as tending to a perpetuity. Not so as regards the realty, because it is in the power of the tenant in tail at any time after attaining majority to discharge the executory limitation engrafted on the estate tail by barring the entail. From which it has been argued in this case that by analogy the personal estate settled upon trusts corresponding to the limitations of the realty ought also to be exempted from the operation of the rule against perpetuities. But this argument overlooks the fundamental objection that no trust could be framed creating an estate or heritable interest in the personalty corresponding to the estate tail in the realty, and there cannot therefore exist any pretext for raising an analogy between the realty and personalty in considering the question of remoteness.

It was further argued that by the use of the words "so far as the rules of law and equity will permit" the testator has effectually guarded himself against the creation of any trust contrary to the rule against perpetuities. But the trust is executed, not executory, and to give to the words relied on the effect contended for would be to ignore this fact. The only true test is to write out in extenso trusts of the personalty corresponding as near as may be to the limitations of the realty and then to determine as a matter of construction whether or no the rule against remoteness is infringed. If it is, the construction cannot, in my opinion, be controlled by the words relied on. Lord Chelmsford L.C. in *Christie v. Gosling* (1) puts it in this way: "The bequest is a declaration,

* (1) L. R. 1 H. L. 290.

by the testator himself, of the trusts of the personal estate, and if he has expressed his intentions so as to offend against the law of perpetuity, the words ‘as near thereto as the rules of law and equity will permit,’ in his reference to the trusts of the real estate, will not assist him.”

EVE J.
1920
HARCOURT,
In re.
VISCOUNT
PORTMAN
v.
PORTMAN.

Much reliance was placed on the case of *Countess of Harrington v. Earl of Harrington* (1), and in particular upon the speech of Lord Westbury, and at first sight it might appear to be an authority in support of the defendant’s argument, but a closer examination of the facts and of the other speeches leads, I think, to the conclusion that Mr. Jarman is right in treating it as a decision showing that the words “so long as the law permits” may be used in a case of doubt in aid of a construction which will not be obnoxious to the rule against perpetuities and not as an authority that the words are effectual to correct a gift which in terms infringes the rule.

The conclusion at which I have arrived is that the shifting clause is void as regards the chattels, and that the respective interests of the plaintiffs in the chattels are not thereby determined.

Solicitors : *Rawle, Johnstone & Co.; Greenfield & Cracknall.*

(1) L. R. 5 H. L. 87.

H. C. G.

C. A. HARMER v. JUMBIL (NIGERIA) TIN AREAS, LIMITED.

1920

EVE J.

[1919. H. 2398.]

July 6, 7, 8.

C. A.

Lease—Explosives Magazine—Packing Shed—Licences—Buildings within prohibited Distances—Grant—Derogation—Covenant for quiet Enjoyment—Implied Obligations—Explosives Act, 1875 (38 & 39 Vict. c. 17), ss. 5, 6.

Oct. 21, 22,

25;

Nov. 12.

In 1911 the tenant for life of settled freehold estate in Cornwall granted a lease to the plaintiff of a small piece of land for twenty-one years at a rent of 7*l.* for the express purpose of an explosives magazine, and he entered into a covenant with the tenant for quiet enjoyment, but no other express covenant. The lessor knew that the purpose for which the grant was made would involve the imposition of some restrictions. The lessee was aware of the nature of the restrictions imposed by a licence for the magazine under the Explosives Act, 1875, and that if buildings were erected upon adjoining land of the lessor's within certain distances of the magazine the licence would be withdrawn. And both knew that there had been extensive working in the past of minerals in the immediate neighbourhood. In 1919 the defendants obtained a lease from the freeholder of the same estate of adjoining land for the purpose of working the minerals, but in such a manner as not to interfere with the explosives magazine of the plaintiff's or the rights of others, and, subject thereto, to erect buildings for the purpose of working the minerals. The defendants reopened two shafts and erected three buildings or sheds within distances prohibited by the plaintiff's licence under the Explosives Act.

In an action by the plaintiff to restrain the defendants from allowing these buildings and works to remain, on the ground that the acts of the defendants constituted a derogation of the lessor's grant:—

Held (reversing the decision of Eve J.), that under the circumstances in which the lease of 1911 was granted there must be implied on the part of the lessor an obligation not to do anything which would violate the conditions under which the licence was held by the plaintiff and thereby cause, ipso facto, a forfeiture of the licence under the Explosives Act, 1875; that the acts done by the defendants would, if done by the lessor, have been in derogation of his grant; and that inasmuch as the defendants were for this purpose in the same position of the lessor, the acts must be regarded as done by him.

Held, therefore, that the plaintiff was entitled to the injunction he claimed, but that its operation must be confined to the existing licence and would not extend to any future licence.

Doctrine of derogation from grant considered and explained by Younger L.J.

Aldin v. Latimer Clark, Muirhead & Co. [1894] 2 Ch. 437, 444, 447 and *Browne v. Flower* [1911] 1 Ch. 219, 225 applied.

Held, by Eve J., on the authority of *Davis v. Town Properties Investment Corporation* [1903] 1 Ch. 797, that the same acts did not constitute

a breach of the lessor's covenant for quiet enjoyment, inasmuch as they did not amount to a direct interference with the enjoyment of the demised land.

C. A.

1920

HARMER

v.

JUMBIL
(NIGERIA)
TIN AREA
LD.

WITNESS ACTION.

THE plaintiff, Robert Joseph Harmer (trading as Jas. R. Watson & Co.), was a wholesale explosives merchant, and had carried on business at 35, Queen Victoria Street, London, for thirty years. The defendant company was a tin mining company formed in 1912 with a capital of 60,000*l*. The plaintiff possessed two magazines for storing explosives, and a packing shed, all licensed for those purposes by the Home Office, and built upon the site of an old disused tin mine in South Cornwall known as the Trevaskis Mine, which had not been in fact worked for some fifty years or more. The first magazine, known as the Lanyon, or New Magazine, was a substantial building with concrete walls eighteen inches thick and slated roof. The second magazine was the Trevaskis, or Old Magazine, larger, and of the same construction. The packing shed was built of wood upon a masonry foundation and roofed with corrugated iron, erected at a cost of 50*l*.

At the date of the lease of December 30, 1911, next herein-after mentioned, certain of the freehold lands in the parish of Gwinear, in the county of Cornwall, known as Lanyon Farm and Trevaskis, stood limited under the will of Sir Samuel Thomas Spry to the use of trustees in fee simple in trust for John Samuel Spry for life, with remainder to his daughter G. May Spry, in tail, with divers remainders over, but subject to a lease dated June 10, 1853, made between Sir S. T. Spry and one Richard Rosewarne, whereby part of Trevaskis (except mines and minerals) was demised by Sir S. T. Spry to R. Rosewarne from March 25, 1853, for ninety-nine years if R. H. Rosewarne, E. A. Rosewarne and C. R. Rosewarne or any or either of them should so long live. By a lease dated December 30, 1911, made between J. S. Spry (the landlord), and the plaintiff, Robert Joseph Harmer, therein described as an explosives merchant trading as Jas. R. Watson & Co. (the tenant), it was witnessed, among other things, by clause 1, the landlord, in exercise of all powers conferred

C. A.
1920
HARMER
v.
JUMBIL
(NIGERIA)
TIN AREAS,
LD.

upon him by the Settled Land Acts, 1882 to 1890, as tenant for life in possession of the hereditaments demised under the will of Sir S. T. Spry, demised unto the tenant all that piece of land containing seven perches or thereabouts situate on Lanyon Farm, together with the explosives magazine erected, or in course of erection upon the said piece of land by the tenant, together with full and free right and liberty for the tenant, his servants, and workmen, to pass and repass with horses and vehicles for the purpose of carrying explosives to and from the highway over the strip of land there mentioned, but for no other purpose, to hold to the tenant as from September 29, 1911, for the term of twenty-one years at the yearly rent of 7*l*. By clause 2 the tenant, for himself and his assigns, covenanted to use the demised premises only as an explosives magazine, and not for the manufacture of explosives. By clause 3 the landlord covenanted with the tenant for quiet enjoyment in the following terms: "The landlord hereby covenants with the tenant that the tenant paying the rent hereby reserved, and observing and performing the several covenants and stipulations herein on his part contained shall peaceably hold and enjoy the demised premises during the said term without any interruption by the landlord or any person lawfully claiming under or in trust for him, or under the said will." The will there referred to was the will which created the settlement.

The magazine demised by this lease (the Lanyon Magazine) was used by the plaintiff as an explosives magazine in conjunction with the Trevaskis Magazine and the packing shed. The title to the Trevaskis Magazine need not be stated, as the claim so far as related to it was abandoned at the trial. As to the packing shed, by a letter or agreement of tenancy, dated March 24, 1896, Charles Richard Rosewarne agreed to James Ronald Watson erecting a shed on a site therein mentioned at Trevaskis for packing explosives at a rent of thirty shillings a year. J. R. Watson carried on his business as an explosives merchant, using the Trevaskis Magazine and the loading shed down to his death in 1899, and the plaintiff, Robert Joseph Harmer, was his surviving executor,

and had since carried on the business with an interest under the will in the profits of the business. Under the provisions of the Explosives Act, 1875, the keeping and storing of explosives in these two magazines and the packing shed was prohibited except by licence granted by a Secretary of State under the Act, and the licences now current were: (1.) as to the Lanyon Magazine a licence dated February 5, 1913; (2.) as to the Trevaskis Magazine one dated November 22, 1889; and (3.) as to the packing shed one dated September 18, 1896.

By the terms annexed to the licence of the Lanyon Magazine dated February 5, 1913, it was stated (*inter alia*) (1.) that the site should be that shown on a plan signed by a Government inspector at a place marked "New proposed Magazine"; (2.) that the distances to be maintained between the magazine and such buildings and works as were specified in the first schedule thereto should be those set forth in that schedule, and if at any time after the grant of the licence, by reason of the approach of any such buildings, or works, the magazine ceased to be beyond the distances therein specified, the licence should cease to authorize the use of the magazine for the keeping of explosives.

By the first schedule to the licence the distances to be maintained between the magazine and other buildings and works from every mineral or private railway, highway or public footpath, "promenade or open place of resort for the public or for persons carrying on any trade or business" were to be not less than 134 yards. From every room or workshop in connection with another magazine, "or any other room or workshop, or any shop," not less than 355 yards. Numerous other buildings were mentioned and the distances from the magazine varied from 355 yards to $4\frac{3}{4}$ miles, the last distance referring to "a Palace or house of residence of His Majesty, his heirs and successors." The defendant company claimed title through G. May Spry (now Mrs. Grant Dalton), daughter of Sir J. S. Spry, who died on May 22, 1915, when she became entitled as tenant in tail in possession of the freehold lands which included Lanyon

C. A.
1920
HARMER
v.
JUMBIL
(NIGERIA)
TIN AREFAS,
LD.

C. A.
1920
HARMER
v.
JUMBIL
(NIGERIA)
TIN AREAS,
LD.

Farm and Trevaskis. She disentailed the property on May 30, 1917.

By an indenture dated June 3, 1919, Mrs. Grant Dalton, as owner in fee simple, for the considerations therein mentioned granted and demised to the defendant company liberty and licence to enter upon the hereditaments described in the first schedule (therein referred to as "The Limits" and which included Lanyon Farm and Trevaskis), and there, in such manner as not to interfere in any way with the explosives magazine of the plaintiff, or the access thereto, and also and without prejudice to any easements, or rights, of others, to dig, work, mine, search for, and take and carry away all mines and minerals as therein mentioned, and (subject to the rights aforesaid) to erect all such buildings, steam and other engines, machinery, and things, and to do such acts and things upon, in, under and about "the limits" as should be necessary for working and getting the said mines and minerals, and the premises thereby granted were to be held by the company for the term of sixty years from January 18, 1919, determinable as thereafter mentioned.

The defendant company had recently begun mining operations on Lanyon Farm and Trevaskis by reopening some old workings, and had timbered some mine shafts, and erected an office, a miners' changing room, and a tool house, all which operations were stated by His Majesty's Inspector of Explosives at the Home Office to be in contravention of the terms of the licences as being within the distances which ought to be maintained between the magazines and packing shed respectively, and any room, workshop, or shop, or any mineral or private railway, or open place of resort for persons carrying on any trade or business; and such licences would be forfeited if the aforesaid operations, buildings and works were allowed to continue or remain.

The plaintiff alleged that the defendant company had laid a light railway close to the packing shed, thereby blocking and interfering with the access thereto, and had also undermined the packing shed, or excavated the soil close thereto, so as to deprive it of support and endanger its stability.

The plaintiff accordingly claimed (1.) an injunction to restrain the defendant company from erecting, constructing, or sinking any buildings, sheds, machinery, railway, shafts, or other works or conducting any mining operations upon, in, or under the land comprised in the lease of June 3, 1919, so as to interfere with, prevent, or make illegal the use of the said magazines and loading shed respectively for the purpose of keeping and storing explosives pursuant to licences granted by one of His Majesty's Principal Secretaries of State under the provisions of the Explosives Act, 1875, or so as to render inoperative or void or endanger the continuance of any such licences, or so as to undermine the said loading shed or deprive it of support, or interfere with the access thereto. (2.) An order to remove the said office, changing room, tool house and railway, and any other buildings or erections put up by the company within the limits prescribed by any such licences. (3.) Damages. The company by its defence denied that by virtue of the lease granted by J. S. Spry, or otherwise, the plaintiff became entitled to any rights as against lands comprised in the sett or lease of June 3, 1919, and there was no privity between him and the company. If there had been any breach of any condition or restriction the plaintiff had no right of action against the company. There was a denial of any injury to the Lanyon Magazine or the packing shed, or of any obstruction to the access to any building by the light truck railway, or of any interference with the safety or stability of any building or erection of the plaintiff's; and further that the company was not bound by any conditions contained in the licences obtained by the plaintiff.

Evidence was given as to the position and nature of the defendants' buildings, the interference with the access to the packing shed, and the excavations which endangered its stability: the result of which evidence appears from the judgment.

The action came on for hearing before Eve J. on July 6, 1920.

Gover K.C. and *P. F. S. Stokes* for the plaintiff. We do not now persist in the claim with regard to the Trevaskis

C. A.
1920
HARMER
v.
JUMBIL
(NIGERIA)
TIN AREAS,
LD.

C. A.
1920
HARMER
v.
JUMBIL
(NIGERIA)
TIN AREAS,
LD.

Magazine but confine it to the Lanyon Magazine, and as to the packing shed our ground of complaint as to that is limited to the interference with the access to it by the railway, and the excavation which has endangered the support of this shed. With regard to Lanyon Magazine we say: (1.) That the acts of the defendants are in derogation from the lessor's grant to the plaintiff which was for a particular purpose only, and the defendants are subsequent lessees with notice of this fact; (2.) these acts are also a breach of the lessor's covenant for quiet enjoyment made by him or those claiming from him; and (3.) in so far as the defendant's acts constitute an interference with the Lanyon Magazine it is in excess of the powers given by their licence or lease. As to (1.) there is an implied grant and an obligation not to derogate from it: *Myers v. Catterson* (1), which was a case of interference with light; *Grosvenor Hotel Co. v. Hamilton* (2), a case of vibration; *Aldin v. Latimer Clark, Muirhead & Co.* (3); *Browne v. Flower* (4), where the principles as to derogation from grant are laid down; and *Cable v. Bryant* (5), where the right of access of air was in question. These were examples of implied obligations with regard to vibration or interruption of light or air and show the principle to be applied. (2.) There has also been a breach of the covenant for quiet enjoyment though it is not a case of physical interference with the plaintiff's enjoyment of the magazine, such as trespass would be; and (3.) there has been an interference with the proper enjoyment of the magazine, as it puts the licence in peril.

Courthope Wilson K.C. and *F. K. Archer* for the defendants. On the first point of derogation from the grant the question is what the grant is. There is admittedly no express grant to the defendants which would interfere with the working of this mine. It is based upon implication when the lease of 1911 was made. The implication suggested is too wide. It is admitted that there must be some implication arising from the special purpose for which the grant was made. *Parker J.*

(1) (1889) 43 Ch. D. 470.

(3) [1894] 2 Ch. 437.

(2) [1894] 2 Q. B. 836.

(4) [1911] 1 Ch. 219, 225.

(5) [1908] 1 Ch. 259, 264.

in *Browne v. Flower* (1) laid down a general principle in too wide terms, as we submit.

The question here is (1.) How far does the implication extend; and looking at all the circumstances what is a reasonable implication to make? When the Court deals with a contract made between business men, it ought to be slow to read into the contract something which is not there. It is confined to what is a necessary implication, such as when a way of necessity is implied. Our contention is that here there is no room for any implication at all. The plaintiff when making his bargain knew the nature of the locality and took the risk of the mines being reopened and worked. It is unlikely that a lessor in his position would undertake never to erect any buildings so as to interfere with the licence to the explosives magazine, and for a tenant who paid a rent of 7*l.* a year. It would practically debar him from erecting any buildings at all within the prescribed area. Assuming, however, that there must be some implication to be made, we submit it must be limited to some physical acts affecting the demised premises by which there is a derogation from the grant. The cases referred to for the plaintiff such as *Aldin v. Latimer Clark, Muirhead & Co.* (2), and others were cases of such physical interference. There must be interference directly or indirectly with the subject matter of the grant. The cases on derogation from grants arising from implied obligations which support this view are *Popplewell v. Hodgkinson* (3), a case of right to support; *Robinson v. Kilvert* (4); *Lyttelton Times Co. v. Warners* (5); *Newby v. Sharpe* (6) also deals with a covenant for quiet enjoyment. Physical interference with the enjoyment of the demised premises is necessary, and all the cases but one cited on behalf of the plaintiff were cases of such physical interference, and the one which was not, failed. Here the plaintiff knowing the nature of the locality might have bargained for a covenant by the lessor not to interfere with

C. A.

1920

HARMER

v.

JUMBIL
(NIGERIA)
TIN AREAS,
LD.

(1) [1911] 1 Ch. 219, 225.

(2) [1894] 2 Ch. 437.

(3) (1869) L. R. 4 Ex. 248.

(4) (1889) 41 Ch. D. 88.

(5) [1907] A. C. 476.

(6) (1878) 8 Ch. D. 39.

C. A.
1920
HARMER
v.
JUMBIL
(NIGERIA)
TIN AREAS,
LD.

the enjoyment of his licence, or that shafts should not be worked, but he has not done so, and has taken the risk. (2.) On the question of the covenant for quiet enjoyment contained in the lease of 1911 the burden runs with the reversion, to which we are not entitled. The defendants are not within the application of the covenant, as we submit. But assuming that the burden has passed to them, we say that the covenant relates to a direct interference with the enjoyment of the demised land, and the acts complained of are not a breach of it: *Davis v. Town Properties Investment Corporation*. (1) Apart from derogation or contract there has been no actionable wrong, and no trespass. On the third point made there has been no excess of powers exercised under the lease of 1919 by the defendants; the lease to them was for the purpose of working the minerals. As to the right of support to the packing shed no appreciable damage has been proved.

Gover K.C., in reply, referred to *Trego v. Hunt* (2), and dealt with the interference with the packing shed which does not call for detailed notice.

EVE J. [after stating the facts and the plaintiff's claim, continued :] The claim to this relief is based, first, on the allegation that the acts of the defendants are in derogation of the grant in the lease under which the plaintiff holds. In this connection it is not disputed that the defendants stand in no better position than the original lessor under whom they claim, and if the acts would have amounted to a derogation from his grant, it is conceded that the defendants must abide by the consequences. The question therefore is whether John Samuel Spry after his lease to the plaintiff could have used his adjoining hereditaments as the defendants are doing, or whether he was debarred from such user on the principle that he could not derogate from his own grant. The principle is, I think, well expressed, in the judgment of Stirling J. in *Aldin v. Latimer Clark, Muirhead & Co.* (3) in the two

(1) [1903] 1 Ch. 797.

(2) [1896] A. C. 7, 25.

(3) [1894] 2 Ch. 437, 444, 447.

passages I am about to read. In the earlier one the learned judge says : "Where a landlord demises part of his property for carrying on a particular business, he is bound to abstain from doing anything on the remaining portion which would render the demised premises unfit for carrying on such business in the way in which it is ordinarily carried on, but that this obligation does not extend to special branches of the business which call for extraordinary protection." And he adds : "In my opinion, Munro"—he was the grantor—"became subject to the obligation to abstain from doing anything on his adjoining property which would substantially interfere with the carrying on of that business in the ordinary course ; and that obligation binds the present defendants as assigns from him." Parker J. (as he then was) puts it in this way in *Browne v. Flower* (1) : "Implications usually explained by the maxim that no one can derogate from his own grant do not stop short with easements. Under certain circumstances there will be implied on the part of the grantor or lessor obligations which restrict the user of the land retained by him further than can be explained by the implication of any easement known to the law. Thus, if the grant or demise be made for a particular purpose, the grantor or lessor comes under an obligation not to use the land retained by him in such a way as to render the land granted or demised unfit or materially less fit for the particular purpose for which the grant or demise was made." But in order to answer the inquiry whether any particular act constitutes a breach of an implied covenant founded on the principle referred to it is necessary to examine the grant and the circumstances in which it was made. There is no doubt that the premises here were demised to the plaintiff for the sole purpose of an explosives magazine. The only express covenant on the lessor's part is the covenant for quiet enjoyment, but it is not denied that some implication is raised by the fact that the demise was for a particular purpose, and that the lessor may consequently be liable for acts not covered by the covenant for quiet enjoyment. The inquiry to what acts the implication extends is one which,

C. A.
1920
HARMER
v.
JUMBIL
(NIGERIA)
TIN AREAS,
LD.
Eve J

(1) [1911] 1 Ch. 219, 225.

C. A.
1920
HARMER
v.
JUMBIL
(NIGERIA)
TIN AREAS,
LD.
Eve J.

as I read the authorities, has to be answered upon an examination of all the circumstances surrounding the grant. I pause, before proceeding to examine those circumstances, to emphasise a point made by Mr. Courthope Wilson in his argument that the acts here sought to be covered by the implication are not acts physically affecting the demised tenement, either by direct interference with it, such as vibration, or the withdrawal of support, or indirectly by the cutting off of some easement, or the interception of some feature necessary for its proper enjoyment, such as light or means of access, or the enjoyment of a current of air required for the conduct of the business for which the premises were let, as were the acts in all the reported cases, but are acts the doing of which only affects the demised hereditaments by bringing about a condition of things in which the continued user of them for the specific purpose becomes illegal. No decision has been cited from the books which goes so far as to raise an implication covering such acts, but it does not, of course, follow from this that such an implication cannot be raised. I turn now to consider the circumstances subsisting at the date of the grant. At that date the lessor had let the greater portion of the surface land on agricultural tenancies reserving the minerals. The locality is a largely mineralized area. The lessee is a man well acquainted with the explosives trade, and, having magazines in this and various other parts of England, with the conditions upon which a licence for the use of these premises as a storage magazine would be granted. I am doubtful as to the respective knowledge of the lessor and lessee with regard to the restrictions and conditions attaching to such a business. The lessee no doubt was perfectly familiar with the ordinary restrictions and I am bound to assume that the lessor had full knowledge of the Explosives Act, 1875, but whether he was acquainted with the restrictions imposed by the Home Office on a licence of premises intended to be used as a magazine is a different matter. In the absence of any evidence that he was acquainted with those restrictions I am not prepared to hold that he knew the precise terms and conditions upon which the licence would be granted, but

I think I am entitled to assume that he must have realized that this site was selected for the magazine because it was at a considerable distance from any dwelling houses or other buildings and from any place of public resort, and I think he must have appreciated that the eligibility of the site was largely owing to its lonely and remote character. So far, therefore, I have a lessor who is a limited owner letting a small piece of land for a purpose which he knew would involve the imposition of some restrictions on the lessee, and a lessee fully acquainted with the nature of those restrictions and conscious that if they were infringed by the erection of other buildings within the prescribed distances, the building would thereupon become an unauthorized one for the storage of explosives. It is I think at least doubtful whether under these conditions the lessee ought not to have insisted on an express covenant if he intended to bind the lessor to observe the restrictions so far as they affected his adjoining property, and whether in the absence of such express covenant there is any principle on which an implication to the same effect ought to be raised. This further must have been known to both parties, that there had been extensive workings for minerals in this immediate neighbourhood—not mere superficial workings but operations involving the sinking of several shafts, some of them to a considerable depth. It is true that for thirty years and probably for a considerably longer period prior to the granting of the lease there had been no attempt to win or work the minerals, but both parties knew of their existence, and must I think, having regard to their notoriously fluctuating value, have appreciated that a time might come when further attempts to work them might be made, and by means of some at least of the existing shafts. The plaintiff, who was cross-examined upon this point, admitted that he did not think it necessary to arrange with the lessor that the shafts should not be reopened; and I am told he added (although I have no note of this part of his answer) that he took the risk of that. I have however this note of his last answer on this subject in cross-examination: “If I had thought there was any possibility of their being

C. A.
1920
HARMER
v.
JUMBIL
(NIGERIA)
TIN AREAS,
LD.
Eve J.

C. A.
1920
HARMER
v.
JUMBIL
(NIGERIA)
TIN AREAS,
LD.
Eve J.

worked, I should have done so” that is “I should have arranged with Mr. Spry that the shaft should not be worked.” The shaft he is there referring to is the main shaft some 200 fathoms deep. From these answers it would appear that the plaintiff did not raise this question with the lessor, because he never thought that the mines were likely to be reopened, and accordingly he elected to run the risk of the consequences to his magazine if they were reopened. This attitude appears to me to be inconsistent with the suggestion that there must be read into the lease an agreement by the lessor that the mines should never again be worked during the term created by the lease. As was pointed out by counsel for the defendants the lessor, if he really came under this obligation, was doing so for a very small consideration—the letting of seven perches of land for an annual rent of 7*l*. I cannot think that in these circumstances I ought to read into this transaction an agreement by the lessor not to exercise his rights as owner of the minerals to work them or to authorize others to work them. Moreover, if the plaintiff is right that under the implied agreement the lessor is not only prevented from working the minerals within the prescribed area, but is also prevented from erecting or authorizing the erection of any building within it, the result would be that he could not during the currency of the lease erect or allow any of his agricultural tenants to erect any building on his farms within the area. I think a very strong case would have to be made out before the Court would impose such restrictions as these. They seem to me to be unreasonable in a transaction of this nature, and having regard to all the circumstances, I do not think I ought to hold the acts of the defendants to be acts in breach of any covenant raised by implication against the lessor under whom they claim. I do not think in this case that the acts can properly be treated as acts done in derogation of the grant even though the result may be that the subject of the demise is by reason of such acts rendered unavailable for the use contemplated when the demise was made.

It is further and alternatively alleged that the acts complained of are in breach of the lessor’s covenant for quiet

enjoyment. The covenant is a qualified one, and it is necessary to state that in this deed the expression "the landlord, where the context so admits, includes the immediate reversioner for the time being expectant upon the term thereby created." The covenant is in clause 3 of the deed. [His Lordship read the covenant and continued:] Now, that these acts interfere with the user of the demised premises is demonstrated by what I have already stated. They have in fact rendered it no longer a proper building for the storage of explosives; but the question whether or not they constitute a breach of the covenant for quiet enjoyment, is, I think, determined by authority, binding upon me, accepted by Lord Parker as an authority in the case which I have already mentioned. I refer to *Davis v. Town Properties Investment Corporation* (1), where Romer L.J. in a short judgment says this: "I only wish to add that, in the case of an alleged breach of the ordinary covenant for quiet enjoyment, where by the alleged breach neither the title to the land nor the possession of the land is affected, and what the lessee complains of is only an interruption of his enjoyment of the land by some act of the lessor, I doubt whether the act complained of is a breach of the covenant unless it amounts to a direct interference with the enjoyment." Cozens-Hardy L.J. expresses his concurrence with that, and adds: "I share the doubt expressed by Romer L.J., whether the decision of Buckley J. in *Tebb v. Cave* (2) can be supported." It is true that the interference in the case before Parker J.—*Browne v. Flower* (3)—was not an interference with the actual user, but with an amenity of the demised premises, but in his judgment I think the learned judge took the view that apart from the particular nature of the interference, inasmuch as the act did not affect either title or possession, it could not properly have been treated as a breach of the covenant. I adopt the same view in this case, and decline to treat the acts of the defendants as a breach of the covenant for quiet enjoyment.

C. A.
1920
HARMER
v.
JUMBIL
(NIGERIA)
TIN AREAS,
LD.
Eve J.

(1) [1903] 1 Ch. 797, 804, 805.

(2) [1900] 1 Ch. 642.

(3) [1911] 1 Ch. 219.

C. A.
1920
HARMER
v.
JUMBIL
(NIGERIA),
TIN AREAS,
LD.
Eve J.

In the action as framed relief was claimed in respect of another magazine and of the packing shed, but those claims in so far as they involve considerations similar to those with which I have so far been dealing in the case of the Lanyon Magazine, were not persisted in. There are however two claims of a totally different character advanced in respect of the packing shed. One relates to the means of access to it and the other to an alleged interference with its foundations. The defendants have in fact destroyed the approach to it by means of carts, and that being admittedly an act for which there can be no justification, the plaintiff is entitled to an injunction to restrain them from interfering with his right of access by means of carts to the shed.

The defendants have also in the course of their operations below the ground in the immediate vicinity of the shed opened a hole the result of which has been to impair to some extent the stability of the shed, and its usefulness as a storage place has been thereby very slightly reduced. That injury will be satisfied by awarding to the plaintiff the nominal damages of forty shillings.

The result is that so far as the action claims any relief founded on an implied covenant in respect of the two storage magazines and the packing shed it fails and must be dismissed with costs. The plaintiffs will be entitled to the costs incurred in respect of the claim for interference with his access by means of carts to the packing shed, and in respect of his claim for damages for interference with its foundations, and in this matter of costs there will be the usual set off.

G. M.

C. A. The plaintiff appealed. The appeal was heard on October 21, 22, 25, 1920.

Gover K.C. and *P. F. S. Stokes* for the appellant.

Courthope Wilson K.C. and *F. K. Archer* for the respondents.

The arguments used in the Court below were substantially repeated. In the course of the argument on the appeal the appellant abandoned any claim to relief under the covenant

for quiet enjoyment contained in his lease, and also any claim by reason of the fact that the respondents' lease restricted the exercise of their mining rights, "so as not to interfere with" the appellant's magazine. The following cases, in addition to those cited in the Court below, were referred to: *Phelps v. City of London Corporation* (1); *Birmingham, Dudley and District Banking Corporation v. Ross* (2); *Quicke v. Chapman* (3); *Jaeger v. Mansions Consolidated* (4); *Howard v. Maitland* (5); *Sanderson v. Berwick on Tweed Corporation* (6); *Cohen v. Tannar*. (7)

C. A.
1920
HARMER
v.
JUMBIL
(NIGERIA)
TIN AREAS,
LD.

Cur. adv. vult.

Nov. 12. LORD STERNDALÉ M.R. This is an appeal from *Eve J.*, which raises, to my mind, a very difficult question, and it arises in these circumstances [His Lordship stated the terms of the lease of December 30, 1911, and continued:] The land demised was very small and the rent also was in fact very small, although having regard to the special purpose for which the land was let it naturally was higher than the prevailing rate of rent for agricultural land in the district. The district was a mineral district, but the minerals had not been worked in it for a great number of years. The period was variously spoken of in the evidence as 30, 40, 50, and one witness put it as long as 80 years, but I think we may take it in round figures, at any rate, that they had not been worked for 50 years, and there was no evidence that at the date of the lease there was any prospect of their being worked in the near future. On September 7, 1911, before this lease was granted, an application had been made to the justices, who were for this purpose and in this district the local authority under the Explosives Act, 1875, to fix a day for the hearing of an application for the licence to use this building as a magazine for explosives. The justices fixed October 10, 1911, and ordered the necessary notices to be published in a local paper. As a matter of fact the notices

(1) [1916] 2 Ch. 255.

(2) (1888) 38 Ch. D. 295.

(3) [1903] 1 Ch. 659.

(4) (1903) 87 L. T. 690.

(5) (1883) 11 Q. B. D. 695.

(6) (1884) 13 Q. B. D. 547.

(7) [1900] 2 Q. B. 609.

C. A.
1920
HARMER
v.
JUMBIL
(NIGERIA)
TIN AREAS,
LD.
—
Lord Sterndale
M.R.
—

were at that time in that paper and in another paper. I am not quite sure whether the hearing was really on October 10, or whether there was an adjournment, but it does not matter, the application was heard and no objection was made, and the justices sanctioned the licence on the terms which had been put before them by the plaintiff. As a matter of fact the actual licence was issued on February 5, 1913, and when issued it contained conditions requiring the maintenance of certain distances between the magazine and other buildings which were specified in the schedule thereto. [His Lordship read paras. 1 and 2 of the terms annexed to the licence and continued :] I do not know the reason for the delay in the issue of the licence. Very likely it was partly occasioned by the fact that, as appears by the lease, the building intended to be used as a magazine was not at its date completed; but I do not think that accounts for the whole of the delay. I do not however think it is necessary to account for the whole of the delay; but it is apparent that the terms and conditions of the licence had been approved and the matter in fact settled before the date of the lease. In 1915 the lessor died, and his daughter, the successor in title to his property, or at any rate this property, dis-entailed and re-settled it, and on June 3, 1919, granted to the defendants a licence to get minerals and also the usual surface rights which accompany a right to get minerals, on a part of the property adjacent to the magazine. The grant was to get these minerals in such manner as not to interfere in any way with the plaintiff's explosives magazine or the access thereunto. Soon after that grant the defendants reopened some old workings. They retimbered one or more of the shafts and set up buildings for the purpose of working the minerals which, consisting amongst others of two sheds and shelters for the men, and the shafts which they retimbered and the buildings which they erected, were within the specified distance to which I have referred. Therefore the licence, if the Government chose to act upon it, became forfeited at once. In the conditions the licence was to be forfeited if buildings were brought within the specified distance and the storing of

explosives became illegal in the spot where the magazine stood. It is for these actions that the plaintiff is now asking for an injunction. He asks for it upon two grounds. He says that what the defendants have done is: (1.) a derogation from the grant to him by his lessor; and (2.) is a breach of the covenant in his lease for quiet enjoyment.

With regard to the law on the matter, I am content to refer to the passages from *Aldin v. Latimer Clark, Muirhead & Co.* (1) and *Browne v. Flower* (2), to which reference was made by Eve J. in his judgment. In fact I am content to adopt the law as stated by Eve J., and I do not think it necessary to discuss it any further. The question we have to solve, adopting the law as so laid down, is: Was there here an act by the defendants that constituted a derogation from the grant made by the original lessor in 1911? It is admitted that, for the purposes of derogation from grant, the defendants are in the same position as the original lessor, and therefore I approach the question from this point of view: Could the lessor, either immediately after the lease, or, at any rate, during the continuance of the term of twenty-one years, have done what the defendants have done without derogating from his grant of this land for the purpose of a magazine for explosives?

It has been said that the surrounding circumstances must be looked at. With that I agree. It has been laid down on more than one occasion that you must look at the surrounding circumstances in order to help you to ascertain what the grant in fact was. Two main objections were taken to the maintenance of this action. The first was that this being a mining district, it must for that reason be taken that there was a reservation, or at any rate, an implication that the grant did not extend so far as to interfere with the lessor's right to work his mines. I do not think that contention is sound. No doubt the fact that it was a mineral district must be taken into account; but I can see nothing here to show that, if the lessor chose to reopen the mine and by so doing interfered with the enjoyment of the land for the purposes of an

C. A.

1920

HARMER

v.

JUMBIL
(NIGERIA)
TIN AREAS,
LD.Lord Sterndale
M.R.

(1) [1894] 2 Ch. 437, 444, 447.

(2) [1911] 1 Ch. 219, 225.

C. A.
1920
HARMER
v.
JUMBIL
(NIGERIA)
TIN AREAS,
LD.
—
Lord Sterndale
M.R.
—

explosives magazine, that was a thing which was contemplated by the parties. It is quite true that the interference here is of a peculiar nature, but it is possible that although the lessor could not work underneath this plot of land because he had not reserved the minerals and therefore he could not withdraw any of the subjacent matter, yet it is quite possible that by working up to the boundary of the land he might withdraw adjacent strata and so cause actual injury to the building upon the land. Whether that is a thing that would or might in the ordinary course happen, under the circumstances of this particular case, I do not know; but I think it is quite clear that to do anything of that kind would be a derogation from the grant, and I do not understand that it is contested. It was said that, if the lessee meant to guard himself against the resumption of mining operations, he should have stipulated against it, and it was also said, and I think correctly, that he used the expression in evidence "He took the risk." I can see no greater obligation upon the lessee to claim a special stipulation for the reservation, or rather for his protection against the reopening of the mines, than I can upon the lessor to reserve his right of damaging the property which he had let by working the mines, if he intended to do so. In one of the cases cited to us it was held that the grant was subject to an interference with the grant of the user of the land by using it, or the adjoining land, by the grantor, a railway company, for railway purposes; and it seems to me, if such a reservation is to be made, it should be made just as much on one side as on the other. As a matter of fact I think, if the use of the expression "took the risk," is going to be relied on, both parties took the risk in this sense. The mines had not been worked for fifty years. I do not believe it was in the mind of either of the parties that there was any probability of their being reopened in the near future; as a matter of fact, it was the extraordinary change in value of minerals by reason of the influence of the late war that induced the reopening of these mines. That is a matter which neither party had in mind, and in that sense I think they both took

the risk of it, that is to say, that neither of them thought it a matter worth considering. I do not think there is anything in that point.

The next point is a more difficult one, i.e., that what the defendants have done is not a physical interference, but is only something which caused the prohibition by a third party of the carrying on of that business upon the demised premises. It was called a metaphysical interference. I am not quite clear what that means, but I am quite clear that the word "metaphysical" is not an apt word to describe what took place here. The question is whether in the circumstances of this case, doing what the defendants did, doing, that is to say, that which ipso facto as soon as it was done caused the forfeiture of the licence, and made it illegal to carry on the business in the premises, was a derogation from the grant of the lessor. I agree with the learned judge that the question has never arisen under circumstances of this kind, and I have found it a very difficult case to decide, and although I feel myself bound to differ from the conclusion at which the learned judge in the Court below arrived, I do so with great hesitation, because I think that this is a case which presents novel circumstances. The defendants, as I have said before, had to deal with the surrounding circumstances; they had to deal with the question of the mining situation. One question is what was their knowledge, or rather what was the knowledge that has to be imputed to the lessor of the circumstances connected with a magazine for explosives. I am not at all sure that a very great deal was not known to him—practically everything—but there is no evidence of it. What I mean is this. Notices of the application that was going to be made were published. Under the Explosives Act, 1875, an applicant has to deposit not only his application for a licence, but the terms upon which he proposes to ask for it, and those terms are considered by the local authority when the application comes before them. I find it very difficult to suppose that all that was not perfectly well known to the lessor and his agents; but, as I have said, there is no evidence that it was, and I will assume,

C. A.

1920

HARMER

v.

JUMBIL
(NIGERIA)
TIN AREAS,
LD.Lord Sterndale
M.B.

C. A.
1920
HARMER
v.
JUMBIL
(NIGERIA)
TIN AREAS,
LD.
Lord Sterndale
M.R.
—

as the learned judge did, that he did not know all those particulars. I will not however, as the learned judge did, assume that he knew all the provisions of the Explosives Act of 1875, but I think he must at least be taken to have known that a licence was necessary for the carrying on of this business, and that it would contain certain conditions ; all the conditions I will assume he did not know, and I think he must be taken to have known that anything which violated those conditions would cause a withdrawal of the licence. As a matter of fact, according to its terms the licence was ipso facto withdrawn on the acts which happened ; but I think he must be taken to have known, at any rate, that acts that violated the conditions of the licence might cause its withdrawal.

In these circumstances is there, or is there not, an implied obligation on the part of the lessor that he would not do anything which would violate the conditions of the licence which was then in existence, or which would come into existence, before the business could be carried on upon the premises ? In my opinion there must be one. I do not wish to go beyond that. I do not wish to say, because it is not necessary to do so, and the point is, I think, a much more difficult one, whether that obligation extends to refraining from doing anything which may violate the conditions of any future licence that may be given upon any different terms imposed by an alteration of the Act and of the authority which granted the licence. I think it is much better to confine myself to the question which is before us—namely, whether there is implied an obligation on the part of the lessor not to do anything to violate the conditions of the existing licence. In my opinion there is such an implied obligation ; therefore I think that what the defendants did, being for this purpose admittedly in the same position as the original lessor, were acts which if done by the lessor would have been in derogation of this grant, and therefore that the plaintiff is entitled to the relief that he claims. I think therefore that the appeal should be allowed and that judgment should be entered for the plaintiff, with costs here and below.

WARRINGTON L.J. The question is whether the principle that a grantor cannot be allowed to derogate from his own grant is applicable under the facts of the present case, so as to entitle the plaintiff to the injunction claimed by him, the terms of which I will refer to in a moment, which has been refused by Eve J.

The principle is now well settled, and I propose, in explanation of it, to read one or two passages from the judgment of Parker J. in *Browne v. Flower*. (1) The statement of the principle by Parker J. is none the less valuable, because in the case in which he made it he did not feel himself in a position to grant the relief claimed by the plaintiff. What the learned judge said was this: "The plaintiffs next relied on the maxim that no one can be allowed to derogate from his own grant. This maxim is generally quoted as explaining certain implications which may arise from the fact that, or the circumstances under which, an owner of land grants or demises part of it, retaining the remainder in his own hands. The real difficulty is in each case to ascertain how far such implications extend. It is well settled that such a grant or demise will (unless there be something in the terms of the grant or demise or in the circumstances of the particular case rebutting the implication) impliedly confer on the grantee or lessee, as appurtenant to the land granted or demised to him, easements over the land retained corresponding to the continuous or apparent quasi-easements enjoyed at the time of the grant or demise by the property granted or demised over the property retained." Then he gave examples of the application of that branch of the principle and proceeded: "Further, the circumstances of the case may be such that though at the time of the grant or demise there be no continuous or apparent quasi-easements enjoyed by the property granted or demised over the property retained, yet easements over the property retained may be impliedly created and become appurtenant to the property granted or demised." Then he gave examples of the application of that branch of the principle and proceeded: "But the implications

C. A.
1920
HARMER
v.
JUMBIL
(NIGERIA)
TIN AREAS,
LD.

(1) [1911] 1 Ch. 219, 224, 225.

C. A. usually explained by the maxim that no one can derogate
1920 from his own grant do not stop short with easements.
HARMER Under certain circumstances there will be implied on the
v. part of the grantor or lessor obligations which restrict
JUMBIL the user of the land retained by him further than can be
(NIGERIA) explained by the implication of any easement known to the
TIN AREAS, law. Thus, if the grant or demise be made for a particular
LD. purpose, the grantor or lessor comes under an obligation not
Warrington L.J. to use the land retained by him in such a way as to render
the land granted or demised unfit or materially less fit for the
particular purpose for which the grant or demise was made.”
Now it is under that branch that the circumstances of the
present case fall.

The material facts are quite simple. [His Lordship stated the facts and continued :] It is admitted that the defendants are bound by such obligations as by the operation of the lease were imposed upon the original lessor ; and we have therefore to deal with the question as if the original lessor were the defendant and had done the acts which are complained of by the plaintiff.

Now there is one matter, a question of fact, which has still to be dealt with. What was the knowledge of the lessor at the time of the lease as to the terms upon which this building would be licensed as an explosives magazine ? There is no evidence as to actual knowledge of the lessor, but, in my opinion, we are justified in imputing to him knowledge of circumstances to which I will refer directly. The district in which the seven perches were situated was a mining district. The magazine was obviously, as I am quite satisfied that the lessor must have been taken to have known, required for the storage of explosives to be used for the purposes of mining somewhere in the district. The actual land which is in question in this action itself contains lodes of tin, but those lodes were either supposed to be worked out, or had been so far worked, that their further working was regarded as unprofitable, and for about half a century there had been no mining workings there at all. Under these circumstances, I am satisfied that we are entitled to impute to the owner of

this land knowledge that an explosives magazine could not be used without the licence of the Secretary of State, and owing to the nature of the purposes for which the building was to be used, I think we may further impute to him the knowledge that any such licence would lay down limits within which buildings and works such as those erected by the defendants could not lawfully be erected, or at least, would provide that if they were erected within those limits, the terms of the licence would be infringed. I do not mean to say that we can impute to him knowledge of the actual limits which would be laid down, and if there had been anything unusual or extravagant in the distances specified in the licence, difficult questions might have arisen. But there is no suggestion that these limits were either unusual or extravagant, and I think therefore we are quite safe in imputing to the lessor—either himself personally or through his agents—knowledge that the explosives magazine could not be used if the buildings came within the distances actually so specified.

Now in these circumstances, is there an implied obligation, arising from the purposes for which these premises were demised, that the lessor would not do anything which would render them unfit, or materially less fit for the purpose for which they were demised? That they have become unfit, not physically, but by reason of the circumstances under which they are now situated, is quite plain. But it is contended that, when it is laid down that the lessor is under an obligation not to render the demised premises unfit for the purpose for which they were demised, all that is thereby meant is that he must not do anything which renders them physically unfit.

Undoubtedly this is the first case in which this particular question has arisen, but for myself I confess that I can see no reason why the principle should be limited in the way contended for by the defendants. The premises have become unfit for the purpose for which they were demised, and this because it is no longer legal for the plaintiff to use them for that purpose by reason of the acts of the defendants; and I cannot see why the acts of the defendants should not have

C. A.
1920
HARMER
v.
JUMBIL
(NIGERIA)
TIN AREAS,
LD.
Warrington L.J

C. A. the same effect in law whether the change brought about by
 1920 them is a physical change in the condition of the demised
 HARMER premises or a change in their condition brought about by
 v. the fact that it has become illegal to use them for the purpose
 JUMBIL intended by the demise.
 (NIGERIA)
 TIN AREAS,
 LD.

The only case which comes anywhere near the present
 Warrington L.J. is *Browne v. Flower* (1), to which I have already referred,
 but that case is in my judgment clearly distinguishable from
 the present. The learned judge there refused the injunction
 asked for, because in his opinion the acts of the lessor had
 not rendered the premises unfit or materially less fit for the
 purposes for which they had been demised, and for this reason.
 The premises had been demised as a residential flat. What
 the defendants had done had not in any way interfered with
 their use as a residential flat except in this respect, that they
 had made them less pleasant for the particular purpose. It
 had rendered it necessary to curtain or veil a certain window
 looking out in a particular direction and so forth, but the
 premises were there and were capable of being used and fit
 to be used as a residential flat; all that the lessor had done
 was to interfere with one of the amenities which the flat had
 enjoyed at the time when the lease was granted. The im-
 portant part of that decision is that it was based by Parker J.
 upon the fact that the demised premises had not been rendered
 unfit or materially less fit by what the defendants had done.
 In the present case these premises have been rendered, not
 only materially less fit, but absolutely unfit for the purposes
 for which they were demised.

One other question was raised by the defendants. They
 contended that in the circumstances of the present case,
 seeing that the area out of which the seven perches were
 taken was a mining area, another implication must be made
 in the lease—namely, that the lessor reserved to himself power
 to do what he might think fit for the purpose of working
 the minerals under that land. On that point I agree with
 what has been said by the Master of the Rolls. If, in the
 circumstances, it may be regarded as reasonable that he

(1) [1911] 1 Ch. 219.

should imply a reservation of that sort, it is equally reasonable that the lessee should seek to imply such an obligation as that which he is now insisting on. I think both took the risk of circumstances arising under which the long unworked minerals should become profitable to work. Those circumstances did arise as the result of conditions which neither of them foresaw, and I think they both took the risk. But the main principle that the lessor shall not be allowed to derogate from the terms of the grant which he has made by the lease, seems to me to be clearly applicable.

With regard to the terms of the injunction, I agree with the Master of the Rolls that it ought to be confined to the facts of which we have actual knowledge, that is to say, that it is to restrain the defendants from doing that which will render it illegal to maintain this building as a magazine for explosives under the existing licence; and that it cannot be extended, as the plaintiff seeks by his statement of claim, to any future licence which may be granted by the Secretary of State. Subject to that, with possibly some modification in the terms of the injunction, the plaintiff is, in my opinion, entitled to the injunction refused by Eve J. This appeal must be allowed, with costs here and below.

YOUNGER L.J. The question here is how far the original lessor was, or how far the defendants as now claiming under him are, bound to restrict the user of their adjoining land so as not to render illegal the only enjoyment of the demised premises which the lessee under his lease is entitled to have. Or, putting the question in another way, was the lessor, or are the defendants, as now claiming under him, entitled to use their adjoining lands in such a way as that for the convenience of such user and for the protection of their own premises the only authorized user of the demised premises by the lessee will become a statutory offence.

Now if these questions are to be answered in a sense favourable to the lessee, it must be on the principle that a grantor shall not derogate from his grant, a principle which merely embodies in a legal maxim a rule of common honesty. "A

C. A.
1920
HARMER
v.
JUMBIL
(NIGERIA)
TIN AREAS,
LD.
Warrington L.J.

C. A.
1920
HARMER
v.
JUMBIL
(NIGERIA)
TIN AREAS,
LD.
Younger L.J.

grantor having given a thing with one hand," as Bowen L.J. put it in *Birmingham, Dudley and District Banking Co. v. Ross* (1), "is not to take away the means of enjoying it with the other." "If A. lets a plot of land to B.," as Lord Loreburn phrases it in *Lyttelton Times Co. v. Warners* (2), "he may not act so as to frustrate the purpose for which in the contemplation of both parties the land was hired." The rule is clear but the difficulty is, as always, in its application. For the obligation laid upon the grantor is not unqualified. If it were, that which was imposed in the interest of fair dealing might, in unscrupulous hands, become a justification for oppression, or an instrument of extortion. The obligation therefore must in every case be construed fairly, even strictly, if not narrowly. It must be such as, in view of the surrounding circumstances, was within the reasonable contemplation of the parties at the time when the transaction was entered into, and was at that time within the grantor's power to fulfil. But so limited, the obligation imposed may, I think, be infinitely varied in kind, regard being had to the paramount purpose to serve which it is imposed. If, for instance, the purpose of a grant would in a particular case be frustrated by some act of the lessor on his own land which, while involving no physical interference with the enjoyment of the demised property, would yet be completely effective to stop or render unlawful its continued user for the purpose for which alone it was let, I can see no reason at all in principle why "ut res magis valeat quam pereat" that act should not be prohibited, just as clearly as an act which, though less completely effective in its result, achieved it by some physical interference. There can, in my judgment, be no valid principle in the contention which was addressed to us in this case by Mr. Courthope Wilson, that, while the lease of 1911 carried with it the obligation of doing or permitting nothing on the adjoining land which would make the explosives magazine less fit for use as a magazine, that is to say, more likely to blow up, it did leave the lessor perfectly free to use his land for his own convenience in any way he chose, even although

(1) 38 Ch. D. 295, 313.

(2) [1907] A. C. 476, 481.

the result of his doing so would ipso facto make the continued user of a powder magazine as such a statutory offence. If that contention were to be accepted it would enable this grantor, if so minded, in pure caprice, to defeat the whole purpose of the grant and completely sterilize the property in his tenant's hands, he himself remaining entitled to the rent reserved for the whole term.

C. A.
1920
HARMER
v.
JUMBIL
(NIGERIA)
TIN AREAS,
LD.
Younger L.J.

In my judgment the principle here applicable is far too great to be in effect destroyed, in the case of such a property as this, by introducing this distinction which, so far as I can see, has no sound foundation on which to rest.

Now I do not myself read, and I do not think either my Lord or the Lord Justice reads, the learned judge's judgment as dissenting from any of these views. The facts did not as he saw them call for their application. In this Court however a different complexion has been placed upon these facts, and as they are now presented, the question is whether they do not bring the case precisely within the principle which I have endeavoured to enunciate and oblige us to answer the question involved in the appeal in favour of the appellant.

This was a lease of a powder magazine which at the date of the lease was in course of erection by the lessee at his own expense. The lease was dated December 30, 1911. Before it was in fact granted, the local inquiry prescribed by the Explosives Act, 1875, had been held and an order had been obtained at Petty Sessions, approving the terms of the licence, which was subsequently made formally effective, I think, in the month of February, 1913. After that licence had been so approved at Petty Sessions, no alteration in it under the statute was possible. To its provisions the approval of the Secretary of State had to be given before it was submitted to the justices, and after it had been approved by them, the obligation under the Act of the Secretary of State to issue the licence became imperative. In fact the licence which was formally granted in 1913 was, as we have seen from its having been shown to us, in the form originally presented by the appellant and approved, first by the Home

C. A.
 1920
 HARMER
 v.
 JUMBIL
 (NIGERIA)
 TIN AREAS,
 LD.
 5 Younger L.J.

Office, and afterwards by the magistrates. The licence, as is indicated by the statute, would be, and I do not doubt was, prepared by the lessee. The application for it, as appears by the Act, involved the statement of the precise situation and plan of the magazine, and also the boundaries of the land forming the area of the magazine, and in this case, the distances to be maintained between the magazine or any part of it and other buildings or works. These matters could not properly be described by the lessee without the knowledge and approval of the lessor or his representative, on whose land the magazine was to be erected. Further, the lessor and his representative were resident in the county of Cornwall; the proceedings at Petty Sessions were notorious. The lessor himself is now dead, but no one was called from the office of his solicitors or otherwise concerned in the transactions on his behalf to give evidence at the trial with reference to the part taken in them by himself or his representatives.

In these circumstances, no evidence to the contrary being forthcoming, I should be prepared, I think, to go further than my learned brothers on this point. The inference to my mind is really irresistible that knowledge of the terms of the proposed licence at the date of the lease was actually possessed by the lessor or his representative, and that the whole transaction, including the erection of the magazine at the lessee's expense, went through on the footing of that licence. But, if I go further in drawing that inference than the facts properly justify, then it must, I think, at least clearly be inferred that the erection of the magazine by the lessee on the lessor's land, followed by its demise for the sole purpose of its being so used, was carried out with the knowledge, common to both parties, that the lessor's adjoining land in the physical condition in which it then stood, permitted the lawful user of the magazine as a magazine in accordance with the original official requirements. Must not there then, even on that hypothesis, be taken to be imposed upon the lessor an obligation not to act in the use of his own land during the term of the lease in such a way as to make the observance by the

lessee of the conditions of that original licence in that respect impossible.

When the then situation of the land is considered, I can have no doubt that this obligation must be taken to have been impliedly assumed by the lessor. For sixty years or possibly longer the mineral workings upon the lessor's property had been abandoned. There is, so far as I can see, no reason to suppose that, apart from the shortage and the high prices of minerals resulting from the world war, the resumption of these workings would now even have been attempted. As viewed from a business point of view in the case of a mineralised property, it is, as it strikes me, much more unlikely that abandoned workings will be resumed, than that, never having been begun, they will be opened. In the same direction too is the fact, although I agree with Mr. Archer that it is not of very great importance, that under the lease of 1911 the minerals are not reserved. Accordingly, in my judgment, so far as opening the mines is concerned, there is nothing in the surrounding circumstances to negative the implication of an obligation on the part of the lessor not to resume mining throughout the duration of the grant in such a manner as to make the continual user of the magazine unlawful as being contrary to the original conditions imposed upon the lessee. And it was not ultimately seriously contended by Mr. Archer, who dealt with this point, that an obligation imposed upon the lessor not to erect or permit the erection of any agricultural buildings on his land within limits prescribed by the original licence would not most reasonably be within the contemplation of both parties. The truth is, that the land here is wild moorland country. The rent for the seven perches, although only 7*l.*, was a high rent. A building worth some hundreds of pounds was to be erected by the lessee and, at the end of the lease, was to remain upon the property for the use of the lessor, and the obligations impliedly imposed upon the lessor, if limited by the terms of the original licence, as I think they ought to be, were, or must have seemed to be, practically non-existent on any reasonable anticipation of future events.

C. A.

1920

HARMER

v.

JUMBIL
(NIGERIA)
TIN AREAS,
LD.

Younger L.J.

C. A. Like my Lord and the Lord Justice, I am not prepared
 1920 to imply any obligation in excess of the terms of the original
 HARMER licence. I cannot see that anything further can reasonably
 v. be presumed to have been contemplated by the parties. The
 JUMBIL limited obligations referred to however must, I think, be
 (NIGERIA) taken to be binding upon the lessor and upon the defendants
 TIN AREAS, claiming under him, and the plaintiff is accordingly, in my
 LD. judgment, entitled to relief on that footing.
 Younger L.J.

Appeal allowed.

Solicitor for plaintiff: *Edwin Cobbing.*

Solicitors for defendants: *Poole & Robinson.*

W. I. C.

C. A.
 1920
 Nov. 11, 12.

In re ELLIS'S SETTLEMENT.

WASBROUGH v. BOYCE.

[1920. E. 378.]

Settlement—On Second Marriage of Wife—Ultimate Trust—Wife's Next of Kin
 —“*Death without having been married.*”

A wife who had divorced her first husband, by whom she had one son, in contemplation of a second marriage settled 12,000*l.* upon trust after the death of herself and her then intended husband for the issue of the marriage, and, in default of issue who should attain a vested interest, directed that the settled fund should be held, in the event of her predeceasing her husband, in trust for such person or persons as under the statutes for the distribution of the effects of intestates would have become entitled thereto at her death “had she died possessed thereof intestate and without having been married.” There was no issue of the second marriage, and the wife predeceased her husband intestate. On the subsequent death of the husband the question arose whether the son of the first marriage was excluded from taking as next of kin. Upon the first marriage the wife had settled a sum of 5000*l.* upon trusts under which, in the events which happened, the son took absolutely on attaining twenty-one, and contemporaneously with the execution of the second settlement she settled a further sum of 5000*l.* upon the son on his attaining the age of twenty-five:—

Held, by Lord Sterndale M.R. and Warrington L.J. (Younger L.J. dissenting), that there was nothing in the context or in the circumstances of the case to show that the words “without having been married”

ought not to be construed as having their natural meaning, which, prima facie, excluded issue of the wife.

Held, by Younger L.J., that in a marriage settlement such a clause ought to be construed as referring only to the marriage then contemplated, and that having regard to the context the words meant "without having been married as aforesaid" or "as now proposed."

In re Brydone's Settlement [1903] 2 Ch. 84 followed.

Decision of Sargant J. [1920] 2 Ch. 432 affirmed.

C. A.

1920

ELLIS'S

SETTLEMENT,

In re.

WASBROUGH

v.

BOYCE.

APPEAL from a decision of Sargant J. (1)

By an indenture dated October 26, 1891, being a settlement made upon the marriage of Thomas Mullett Ellis and Mary Boyce (hereafter called the husband and the wife respectively), the wife covenanted with trustees to pay to them the sum of 12,000*l.*, and it was provided that this sum should be invested by the trustees, who should from the resulting income, during the joint lives of the husband and wife, pay to the husband a sum of 300*l.* yearly (subject to a provision for determination in certain events) and pay to the wife the residue of such income, and after the death of either of them pay the whole of the income to the survivor during his or her life. After the death of the survivor the trustees were directed to hold both the capital and income of the said sum or the investments representing the same upon trust for the issue of the marriage as therein mentioned, and it was declared that, if there should be no child of the marriage who, being a son, should attain the age of twenty-one years, or, being a daughter, should attain that age or marry, the trust premises were to be held in trust for such persons as the wife should while discovert by deed or whether covert or discovert by will appoint, and in default thereof, if she should survive the husband then in trust for herself, but if the husband should survive her then "in trust for such person or persons as under the statutes for the distribution of the effects of intestates would have become entitled thereto at the decease of the said Mary Boyce had she died possessed thereof intestate and without having been married such persons if more than one to take as tenants in common in the shares in which they would have been entitled under the same statutes."

(1) [1920] 2 Ch. 432.

C. A. There was no issue of the marriage and the wife died
1920 intestate on March 13, 1893. The husband died on August 20,
ELLIS'S 1919.
SETTLEMENT, The wife had been previously married to Charles Louis
In re. Boyce, against whom, on February 12, 1889, she had obtained
WASBROUGH a decree absolute of divorce. Of that marriage there was
v. issue one child only, Charles E. S. Boyce, who was born on
BOYCE. September 9, 1887. In contemplation of the first marriage
 the wife had, by a deed dated October 13, 1886, settled a
 sum of 5000*l.* Consolidated 3 per cent. annuities upon trusts
 under which C. E. S. Boyce became, in the events which hap-
 pened, entitled on his attaining the age of twenty-one to the
 whole fund.

Contemporaneously with the settlement of October 26, 1891, the wife made a further settlement of 5000*l.* in favour of C. E. S. Boyce on his attaining the age of twenty-five years.

On the death of the husband the question arose whether on the true construction of the settlement of October 26, 1891, and in the events which had happened the trust funds were held in trust for C. E. Boyce, or for the persons or the respective assigns of the persons who under the statutes for the distribution of estates would have been entitled thereto at the decease of the wife had she died possessed thereof intestate and without ever having been married to Charles Louis Boyce or any other husband.

On March 31, 1920, the trustees took out a summons for the determination of this question.

The summons was heard in July, 1920, when Sargant J. held that C. E. S. Boyce took no interest under the settlement, and that the trust fund went to the wife's next of kin under the statutes, as if she had never been married at all.

C. E. S. Boyce appealed.

Galbraith K.C. and *Dighton Pollock* for the appellant.

A. Grant K.C. and *Harman* for brothers and sisters of the wife or their assigns.

G. G. Solomon, Roope Reeve and W. A. Greene for other respondents in the same interest.

C. W. Turner for the trustees.

C. A.

1920

ELLIS'S
SETTLEMENT,
In re.

WASBROUGH
v.
BOYCE.

The arguments used in the Court below were substantially repeated. They sufficiently appear from the judgments of the Court. The following additional cases were referred to in the Court of Appeal: *Horseman v. Abbey* (1) and *Morris v. Howes*. (2)

LORD STERNDALÉ M.R. This case raises a question of importance, because it arises upon the construction of a common form clause, and the question is whether in the settlement the words "without having been married" have the meaning "without having been married to any one," or "without having been married to the then intended husband." [The Master of the Rolls stated the facts and continued:] The question is whether the clause under consideration means that the estate is to be distributed as if Mary Boyce had not been married at all. If it does, then, the only child—that is to say, the child of the first marriage—is excluded from participation in this distribution under a supposed intestacy, and the 12,000*l.* goes to the next of kin who are brothers and sisters of the testatrix. If, on the other hand, it means die "without having been married as contemplated at that time, or married to the then intended husband," then the child of the first marriage will take the whole 12,000*l.* It is a fact, and one of the circumstances to be considered, that this child was entitled to a sum of 5000*l.* under the marriage settlement of his father and mother on the first marriage. It is also a fact that contemporaneously with the second marriage settlement Mary Boyce made a voluntary settlement upon him of a second sum of 5000*l.*, which came from the same source as the 12,000*l.* which is dealt with in the settlement—namely, from the bounty of a testator under whose will she was a beneficiary. It seems to me that if you take the two phrases, "without having been married," and "without ever having

(1) (1819) 1 Jac. & W. 381.

(2) (1845) 4 Hare, 599.

C. A. 1920
 ELLIS'S
 SETTLEMENT,
In re.
 WASBROUGH
v.
 BOYCE.
 Lord Sterndale
 M.R.
 —

been married," apart from any context, and consider them simply as ordinary English phrases, *prima facie* they mean the same thing, and, therefore, "without having been married" means, *prima facie*, "without having been married at all." I do not think that was disputed on behalf of the appellant, but it is said in the first place that that *prima facie* meaning is not the meaning to be attributed to it in a marriage settlement; and secondly, whether it bears that *prima facie* meaning or not, the context in this settlement is sufficient to give it the meaning of "without having been married as intended."

There is a long series of authorities with regard to this matter, and all the cases have been very carefully discussed by Sargant J. It is useful to ascertain the foundation of the cases which were said to be favourable to the appellant's contention. The first is *Wilson v. Atkinson*. (1) The decision itself, as was pointed out by Sargant J., is of no value whatever in determining the present case, because there were in that case words comprised in a declaration with regard to an illegitimate child of the testatrix which made it quite clear that children were intended to be included, but that case was taken as laying down a general principle the nature of which I will mention directly, and some words of Knight Bruce L.J. and Turner L.J., particularly those of Turner L.J., were taken as establishing a general principle of construction that must be applied to all clauses of this description in a marriage settlement. Knight Bruce L.J. said (2): "The words 'and without having been married' are part of that settlement upon which the difficulty arises; and the point which we have to determine is, whether these words ought to be read as signifying 'without having been married to any one,' or 'without leaving a husband living at her death'; or, lastly, 'without having been married to her then intended husband.' The context forbids the first of these constructions; and this I think, even independently of the following declaration, viz., that the Appellant should for the purposes of the preceding trust, which was for the next of kin, be deemed to

(1) (1864) 4 D. J. & S. 455.

(2) *Ibid.* 460.

be the lawful child of Jane Atkinson." I do not think it is at all clear what was the context to which the Lord Justice there referred. Then Turner L.J. says (1): "Even if it be necessary to construe the terms of the trust for the next of kin independently and without qualifying them by the subsequent declaration, still in my judgment the trust for the next of kin ought not to be so construed as to exclude children." It is those words of Turner L.J. which are more specially relied upon as establishing a principle.

C. A.
1920
ELLIS'S
SETTLEMENT,
In re.
WASBROUGH
v.
BOYCE.
—
Lord Sterndale
M.R.
—

The next case is *In re Ball's Trust* (2) before Fry J. I am not dealing with the facts of that case, but Fry J. said this: "In this case if there had been no authority I should have had considerable difficulty in holding that the child was entitled to the fund, because if the mother had never been married she could never have had a child capable of taking. But the case appears to be covered by the decision in *Wilson v. Atkinson* (3), which is in substance the same as the case now before me, the exception being that it contained the declaration as to the illegitimate child. The Lords Justices there gave two reasons for their decision; one was that there was an express declaration as to the illegitimate daughter, which must have some meaning given to it; but independently of that declaration, both the learned judges held that the words 'next of kin' would not be construed so as to exclude a child; in other words, that under a limitation like this a child may claim as statutory next of kin of the mother."

The question next arose before the same learned judge in *Upton v. Brown* (4), and there he did not express the doubt he had expressed in *In re Ball's Trust* (2), but stated very clearly what he considered was the principle laid down by *Wilson v. Atkinson*. (3) He says (5): "In my view this case is covered by *Wilson v. Atkinson* (3), which, I think, is a decision that such words of limitation as are found in the present settlement are introduced merely to exclude any husband of the wife, and not to exclude any persons who may be her descendants."

(1) 4 D. J. & S. 461.

(3) 4 D. J. & S. 455.

(2) (1879) 11 Ch. D. 270, 271.

(4) (1880) 12 Ch. D. 872.

(5) *Ibid.* 878.

C. A. That is adopting, it seems to me, the words I have read from
 1920 the judgment of Turner L.J., that the clause must be taken
 ELLIS'S to exclude only the husband and not the children.
 SETTLEMENT, The other cases all follow upon the adoption of that
In re.
 WASBROUGH principle by Fry J. It is, to my mind, quite clear that, in
 v.
 BOYCE. adopting the supposed principle of *Wilson v. Atkinson* (1), the
 Lord Sterndale learned judges who decided the cases referred to by Sargant J.
 M.R. drew no distinction between children of the intended marriage
 and children of a previous marriage. In some of the cases
 there were no children of a previous marriage, it being the
 marriage of a spinster, but the majority of them were cases
 dealing with children of the intended marriage. Now for
 the purpose of the interest of the children of an intended
 marriage it is perfectly immaterial whether the words mean
 "without having been married as intended," or "without
 having been married at all," because in either case, whichever
 phrase might be used, it would inevitably exclude the children
 of the intended marriage from participation in the supposed
 intestacy. But in *In re Ball's Trust* (2), *In re Mare* (3), and
Stoddart v. Saville (4), the Courts were dealing with children
 of the intended marriage; and, applying the principle which
 the learned judges thought was to be extracted from *Wilson v.*
Atkinson (1), they held that the children of the then intended
 marriage were entitled to participate in the distribution as
 under a supposed intestacy. It is clear, therefore, that they
 were not considering, and did not consider in any way, except
 in *Wilson v. Atkinson* (1), any difference in phraseology
 between "without having been married" or "without having
 ever been married," because, whichever it might be, the
 children of the intended marriage, but for the supposed
 principle laid down in *Wilson v. Atkinson* (1), must be
 excluded.

In *In re Forbes* (5) the child of a former marriage was
 concerned, and the clause provided that the property was
 to be held in trust for such person or persons as under the

(1) 4 D. J. & S. 455.

(3) [1902] 2 Ch. 112.

(2) 11 Ch. D. 270.

(4) [1894] 1 Ch. 480.

(5) [1899] W. N. 6.

statutes for the distribution of the estates of intestates would at the time of the wife's decease have been entitled thereto as if she had then died possessed thereof a spinster and intestate, and yet in spite of these words the learned judge actually held that the child of a former marriage was entitled to take. The words "if she had died a spinster and intestate" are at least as strong as "without having been married and intestate," but in consequence of this supposed rule that children were never to be excluded, even on those words the learned judge held that the child of the former marriage was included.

In *Emmins v. Bradford* (1), however, Sir George Jessel declined to follow, or to assent to, the line of cases to which I have referred. He said that *Wilson v. Atkinson* (2) did not lay down any such general principle at all, he discussed the cases, declined to follow them, and held that the property went to the persons who would have been entitled thereto as if the lady had died a spinster. It is perfectly true that the words in that case were "without ever having been married," and one would have thought that there could be no question about such words, but I think it is to be noticed that if Sir George Jessel attached any importance to the difference in a marriage settlement between "without ever having been married," and "without having been married," there was the plainest possible distinction between the case before him and the case he was discussing, from the fact that the one contained the word "ever," and the other did not, and he makes no reference to the distinction between the two phrases. It would have been unnecessary to consider, as he did, whether those cases were right, and whether the principle suggested by them was right, if he had attached any importance to the difference between the two phrases, and that is really the only importance, to my mind, of that decision, except that it rejected the idea that there was any general principle to be extracted from *Wilson v. Atkinson*. (2)

After that came *Stoddart v. Saville* (3) before Chitty J.,

C. A.
1920
ELLIS'S
SETTLEMENT,
In re.
WASBROUGH
v.
BOYCE.
Lord Sterndale
M.R.

(1) (1880) 13 Ch. D. 493.

(2) 4 D. J. & S. 455.

(3) [1894] 1 Ch. 480.

C. A. which was concerned with the children of an intended marriage, and he declined to follow what Sir George Jessel had said, and decided that the children of the intended marriage were entitled to participate. There was only one child. That was the marriage of a spinster, and, therefore, the difference between the phrases, or the absence of the word "ever" was immaterial; but the learned judge held, although the estate was to go as if the lady had died intestate "and without having been married," it went to the child of the intended marriage.

All these cases came before Swinfen Eady J. in *In re Smith's Settlement* (1), where he discussed them all and came to the same conclusion as Sir George Jessel. That was also the case of a child of the intended marriage.

Then in *In re Brydone's Settlement* (2) Kekewich J. followed the previous cases, and in effect his own decision in *In re Mare* (3), in which he had decided that similar words in a marriage settlement were to be construed as intended to exclude the husband, but not to exclude the children of the marriage. That case went to the Court of Appeal, and the Court of Appeal decided once for all, so far as we are concerned, that the supposed principle which had been applied in the numerous cases I have mentioned was not to be found in *Wilson v. Atkinson* (4) at all. It is stated, perhaps most clearly, by Cozens-Hardy L.J., who says (5): "I agree with the view taken by Jessel M.R. in *Emmins v. Bradford* (6) that *Wilson v. Atkinson* (4) did not lay down any general principle by which the Court would be bound in construing any other document." Therefore it seems to me that the numerous cases which depend upon the supposed principle of *Wilson v. Atkinson* (4) are no longer of any authority upon such a point as that which we have to decide, because they proceed upon a supposed principle which has been held not to exist. It is quite true that you cannot find, in any of them, children of a former marriage excluded, but that is necessarily true,

(1) [1903] 1 Ch. 373.

(2) [1903] 2 Ch. 84.

(3) [1902] 2 Ch. 112.

(4) 4 D. J. & S. 455.

(5) [1903] 2 Ch. 97.

(6) 13 Ch. D. 493.

because you do not find the children of any marriage excluded, and if children of the intended marriage are included then the children of a former marriage would be included also. They proceed upon the principle that no children are to be excluded at all by such a clause as this, and that the clause is inserted simply for the purpose of excluding the husband. It is, perhaps, to be noted that the words "without having been married" are quite unnecessary for that purpose, because the husband is excluded if those words are not put in at all; but it probably is the case that when the learned judges said the object was to exclude the husband they were dealing with the whole clause and not those words alone.

C. A.
1920
ELLIS'S
SETTLEMENT,
In re.
WASBROUGH
v.
BOYCE.
Lord Sterndale
M.R.

In that state of the authorities it seems there is nothing left to us except that we have to look at this document, and at such surrounding circumstances as there are, in order to see what is the meaning of the words in this document, and that there is no general principle laid down either in *Wilson v. Atkinson* (1), or anywhere else, by which you can ascertain what these words mean, except that they must be construed in their ordinary natural grammatical meaning in English, unless there is something to show they are to be read in another sense. I have already said that, apart from any context, it is not disputed that these two phrases, "without having been married" and "without ever having been married," would mean the same thing. The first context, so to speak, that was mentioned to us, was that this was a marriage settlement, and that a marriage settlement must be taken to speak simply of the marriage with which it deals, and nothing else. I cannot find any such general principle laid down as that the words "without having been married," in their ordinary meaning must necessarily, when they are used in a marriage settlement, be confined to "without having been married as intended at this time." It is quite true that in a considerable number of instances this settlement pointedly refers to the intended marriage. The first instance I see is that, in the covenant to pay the 12,000*l.*

(1) 4 D. J. & S. 455.

C. A. there is the usual clause that it shall be paid "if the said
 1920 intended marriage shall be solemnised." Again, I find that
 ELLIS'S another clause speaks of Mary Boyce in certain events taking
 SETTLEMENT, the income, but "so that the said Mary Boyce shall not during
In re.
 WASBROUGH her said intended coverture have power to dispose of or
 v. charge" her interest. Again, I find "that if there shall be
 BOYCE. no child of the said intended marriage" then certain things
 Lord Sterndale shall happen; and, again, there is a trust "for all the child
 M.R. or children of the said intended marriage." Then again,
 — she is to dispose by deed when discoverd, and by deed or will
 whether covert or discoverd; and immediately afterwards
 her "said intended coverture" is spoken of. I cannot see
 that those words expressly referring to the intended marriage
 and to the intended coverture can operate to show that when
 words which in their natural meaning extend beyond the
 intended marriage are used, they must be limited to the
 intended marriage.

We have to look at the whole state of circumstances. The lady is described simply as Mary Boyce. That, of course, is quite natural. She could not be described as a spinster, or as a widow, and no doubt she did not wish, and properly did not wish, to be described as a divorced woman. There is no reference whatever to the former marriage in any way. The child of the former marriage was undoubtedly excluded from the benefit of any part of the 12,000*l.* if there should be any children of the intended marriage; and simultaneously with this settlement a provision was made by the testatrix for that child of the former marriage. It looks as if this settlement were intended to be cut quite adrift and apart from anything connected with the former marriage. But it is said an intention can still be found that, if there be no children of the intended marriage, the child of the former marriage shall be included in the benefit; in fact, that child would take the whole of the benefit in the 12,000*l.* to be distributed under the clause in question. I doubt if we have any right to speculate, and it would be no good to do so, as to what the testatrix might have meant if she had had the matter put to her. She might have said that, in the absence

of children of the intended marriage, she wished the child of the former marriage to take the 12,000*l.* as well as the 10,000*l.* he had got. She might possibly have said that he was well provided for with 10,000*l.*, and if there were no children of the marriage, the fund should go among her brothers and sisters; but it is of no use to speculate, even if we had the right to do so, as to what she would have wished. We must look at the words and find whether there is anything in the document, connected with the circumstances, which shows that they are to be read in a non-natural sense. If it is to be said generally that the natural sense of the words, in every marriage settlement, is that they must be taken to refer only to the intended marriage, then, of course, one result must follow, but that general proposition cannot be maintained any more than the general proposition formerly supposed to be laid down in *Wilson v. Atkinson* (1); and in this case I cannot find anything that makes it necessary, or right, for us to read the words in any but their ordinary grammatical sense. I think that you can read them in their natural sense unless driven to read them in another, either by their being, in their natural sense, quite repugnant to the rest of the document, or their being quite opposed to the wishes clearly expressed in the document. I cannot find anything of that kind here; and, therefore, taking into consideration, as we are entitled to do, the provision made by the settlor for the child of the former marriage contemporaneously with the making of this settlement, I agree with Sargant J. that the natural meaning of these words is "without ever having been married," or "without having been married at all," and that the child of the former marriage is excluded from the benefit of the distribution under this intestacy.

C. A.
1920
ELLIS'S
SETTLEMENT,
In re.
WASBROUGH
v.
BOYCE.
Lord Sterndale
M.R.

WARRINGTON L.J. I am of the same opinion. This is one of those cases in which the Court is asked to give a non-natural meaning to ordinary English words in deference to a supposed rule that, because those words are used in a

C. A. document of a particular nature, they are to have a special
 1920 technical meaning—a meaning which, in ordinary grammatical
 ELLIS'S English, they would not bear unless the parties to the
 SETTLEMENT, document show that they did not intend that they should
 In re. bear that special technical meaning. The words in question
 WASBROUGH speak of a person who shall die “without having been
 v. BOYCE. married.” In ordinary grammatical English those words, to
 Warrington L.J. my mind, quite plainly mean, in the absence of any context,
 without having gone through the ceremony of marriage with
 any person. But it is said that that is not the meaning that
 they are to bear in a marriage settlement. It had been
 supposed for many years that there was a general rule of
 construction applicable to the use of such words in a marriage
 settlement; and it is a little important to see what the
 supposed general rule was. I think that is quite clearly
 shown by the opening words of the judgment of Fry J. in
Upton v. Brown (1): “In my view this case is governed by
Wilson v. Atkinson (2), which, I think, is a decision that such
 words of limitation as are found in the present settlement are
 introduced merely to exclude any husband of the wife, and
 not to exclude any persons who may be her descendants.”
 I ought, perhaps, to have read the whole phrase in which
 those words appear which is an ultimate trust for the wife’s
 next of kin, and is in these terms: “In trust for such person
 or persons as under the statutes for the distribution of the
 effects of intestates would have become entitled thereto
 at the death of the said Sarah Robinson, had she died possessed
 thereof intestate and without having been married.” Let
 me examine that general rule, as it is stated by Fry J., and
 see what support there is for it. In the first place it is to
 be noticed that he says in terms that those words are intro-
 duced merely to exclude any husband of the wife. How
 can that be so? Any husband of the wife would be excluded
 by the trust for the persons who, under the Statute of Distri-
 butions, would be entitled to the effects of intestates without
 the introduction of those words at all. The husband is not
 entitled under the Statute of Distributions, he is entitled at

(1) 12 Ch. D. 878.

(2) 4 D. J. & S. 455, 461.

common law in right of his wife. Therefore, if it is a general rule that those words are introduced merely to exclude the husband, the general rule comes to this, that the words are to have a special technical effect, the insertion of which words, if they have that effect, is entirely unnecessary. But the general supposed rule does not originate in the judgment of Fry J. He acted on what he thought was a general rule established by *Wilson v. Atkinson*. (1)

C. A.
1920
ELLIS'S
SETTLEMENT,
In re.
WASBROUGH
v.
BOYCE.
Warrington L.J.

Now I turn to that case, and the more I look at it the more puzzled I am to understand how it came about that it was supposed to have established the general rule in question. It was an extremely special case. The lady in question was a widow at the date of the particular marriage, and she had an illegitimate daughter and no other children. A settlement was made on her second marriage which contained no provision for children, but it did contain an ultimate trust in these words: "In trust for such person or persons as under the Statutes for the Distribution of the effects of intestates would have become entitled thereto at the decease of the said Jane Wilson, if she had died possessed thereof intestate without having been married, such persons, if more than one, to take as tenants in common and in the shares in which they would have taken under the same Statutes." And then comes this declaration: "And it is hereby declared that Jane Elizabeth Hogarth Atkinson, the daughter of the said Jane Wilson, shall for the purposes of this trust be deemed to be the lawful child of the said Jane Wilson." That is to say, that a trust for the next of kin of a person who is supposed to have died intestate and without having been married, is to include children, but if children are to be included in that trust, then that direction would be repugnant to the expression "without having been married," if you give it the ordinary construction. It was necessary, therefore, in that case to give to the phrase a special construction, and that is what the Court of Appeal did. But unfortunately, if I may say so with all respect, they went beyond what was necessary for the decision of the case before them and added a general

(1) 4 D. J. & S. 455, 461.

C. A. expression of opinion. Knight Bruce L.J. says that the
 1920 latter clause constituted an effectual and binding provision
 ELLIS'S to the benefit of which the appellant was entitled, and then he
 SETTLEMENT, goes on to say, "Both provisions read together"—that is to
In re. say, the special provision and the general provision for
 WASBROUGH next of kin, as if the wife had died intestate—"certainly
 v. BOYCE. give the appellant a right to the fund, and she appears to me
 Warrington L.J. accordingly entitled to succeed." If you take that judgment
 alone, it is difficult to find any suggestion of any general
 rule, although I think it is implied, but Turner L.J. is more
 explicit. After dealing more at length with the provisions
 in the settlement he goes on to say: "Even if it be necessary
 to construe the terms of the trust for the next of kin inde-
 pendently and without qualifying them by the subsequent
 declaration, still in my judgment the trust for the next of
 kin ought not to be so construed as to exclude children."
 It is upon those words of Turner L.J. which were not
 necessary for the decision of the case that the supposed
 general rule was founded, be it remembered a general rule the
 effect of which was that the husband, and only the husband,
 was excluded by that provision. However, it is not really
 worth while saying more on the point, because that general
 rule seems to have received its final quietus by the decision
 of this Court in *In re Brydone's Settlement* (1), and at all
 events, as far as the children of the actual marriage in
 question are concerned, it must be taken now that, in the
 absence of any special covenant, or of any special circum-
 stance showing that the parties used the words not in their
 natural, but in an unnatural sense, the children of the
 marriage would, by these words, be excluded from the class
 of next of kin.

But it is contended in this case, that although the general
 rule referring to children in that sense can no longer be
 treated as a general rule of law, there is another—namely,
 that in the absence of circumstances showing that the
 parties have used the words "without having been married"
 in their ordinary and natural sense, or in the absence of

(1) [1903] 2 Ch. 84.

a context of the same nature, those words must be read as if they meant "without having been married to the then intended husband," that is, they must be read as if they had been, "without having been married to"—in this case—"Thomas Mullett Ellis." I am of opinion that if there is to be such a general rule this Court, sitting here, would now have to lay it down for the first time, because I cannot find any trace of the existence of any such general rule any more than I can find, with reference to the other one, any sufficient authority in its support, and indeed, there is one case in Ireland before a very learned judge, the Master of the Rolls: *Hardman v. Maffett* (1), where, under such words as we have in the present case, the children of a subsequent marriage were excluded, and therefore he did not read the words "without having been married," as meaning without having been married to A. [B. the husband, who was a party to the settlement in question.

C. A.
1920
ELLIS'S
SETTLEMENT,
In re.
WASBROUGH
v.
BOYCE.
Warrington L.J.

In my judgment, therefore, we have to look at this document as at any other document, take its context, take the surrounding circumstances, consider them all, and if they show that the words must be read in any other than their natural meaning, then the other meaning must be given to them, but not otherwise.

First, I look at the document itself, a document which refers many times, as all marriage settlements do, to the "said intended marriage," to the "said intended coverture," and so forth, and in this particular clause speaks of a hypothetical case of the lady dying "without having been married." Speaking for myself, and in this I agree with the Master of the Rolls, I should regard those references to the "said intended marriage," followed as they are by the words "without having been married," as indicating rather that the parties were using the words "without having been married" as meaning what in the ordinary English they do mean, and if they had intended them to be limited in the same way as marriage, or coverture, in the other expressions were limited, they would have so limited them by inserting

(1) (1884) 13 L. R. Ir. 499.

C. A. the name of the husband, or in some other obvious way.
1920 I can find nothing in the context requiring us to give any
ELLIS'S other than the ordinary meaning to the words "without
SETTLEMENT, having been married."
In re.

WASBROUGH Then, is there anything in the surrounding circumstances ?
v.
BOYCE. The material surrounding circumstances are these. The wife
Warrington L.J. had been previously married, she had one child of that
marriage who was a boy of five years old, and she had obtained
a divorce from her previous husband. On the occasion
of her marriage with the previous husband a settlement
had been executed under which this boy would become
entitled to a settled fund of somewhere about 5000*l.* As part
of the arrangement on the second marriage she had by a
document contemporaneous with her marriage settlement,
covenanted to pay out of the same funds as those out of
which she covenanted to pay the settled funds, a sum of
5000*l.* to the same trustees as those of the settlement to be
held by them on certain trusts in favour of this boy. Is
it not plain that, when she entered on this second marriage
being possessed of this fortune, she made what was thought
to be an adequate provision for the child, and subject to that
she had dealt with this fortune of hers in the way she has
dealt with it by the settlement. Those circumstances cer-
tainly, to my mind, rather than leading towards an unnatural
construction of the words "without having been married,"
indicate that she intended to use those words in their
ordinary sense, and that such provision as she thought
sufficient for this child had already been made by her original
settlement, and by that contemporaneous document. For
these reasons, I agree with the judgment of Sargant J., which
was to the effect that, under all the circumstances, upon the
true construction of the settlement in question, the child
of the previous marriage was excluded by these words. The
lady died very shortly after her second marriage leaving
no issue, and leaving this little boy her surviving, and
brothers and sisters who were her next of kin ; Sargant J.
decided that the funds under the settlement go to the next
of kin other than the boy. I think the appeal fails.

YOUNGER L.J. In this case, as in most cases, I am fully conscious of the prudence of adopting, where possible, a literal interpretation of ordinary English words. But such an interpretation, without due regard to the purpose and object of the instrument in which the words to be interpreted are found, may, owing to the poverty of language to convey its intended meaning, have consequences far other than those within the contemplation of the instrument, and be contrary to its purpose and intent. It is possibly for that reason amongst others, and notably in the interpretation of such an instrument as a marriage settlement, the most obvious purpose of which is to provide for the husband, wife and issue of the intended marriage, that the Courts, in cases where the words are susceptible of what I may call reasonable ambiguity, or where on one view of their meaning their presence would be quite superfluous, have interpreted them in a sense which in another instrument, or, divorced from the context, would not be permissible; and all in order not to defeat the presumed purpose of the instrument. A striking instance, one also of the earliest authorities on the subject, and at the same time a decision of the House of Lords itself, is to be found in *Clarke v. Colls* (1) where, two meanings of the word "unmarried" occurring in a marriage settlement being permissible, a majority of the House adopted a construction of the word which made it, in the place where it was found, altogether superfluous, and rejected an equally permissible construction which would have made the word far from superfluous, and that merely because the latter construction would, if adopted, as the majority of the House thought, have defeated one assumed purpose of the instrument—namely, to make provision for the children of the marriage in all events.

The length to which the majority of the House went on that occasion, and the disregard of the ordinary rules of construction which their interpretation of the word involved, are set forth with the utmost plainness in the powerful speech of Lord Wensleydale, who dissented. But notwithstanding his trenchant criticism the majority of the House adhered to

C. A.
1920
ELLIS'S
SETTLEMENT,
In re.
WASBROUGH
v.
BOYCE.

(1) (1861) 9 H. L. C. 601.

C. A. their interpretation of the word, and one incidental result,
 1920 very helpful in the present case, is alluded to by Lord Cran-
 ELLIS'S worth in the last part of his speech. The word "unmarried"
 SETTLEMENT, there occurred in a clause similar to that with which we are
In re.
 WASBROUGH here dealing, the difference being that that word was used
v.
 BOYCE. there instead of the words "without having been married,"
 Younger L.J. with which we have now to do. Now Lord Cranworth, in
 ——— support of the view he took of the meaning of the word,
 says this (1): "I do not forget, that in the settlement now
 before us, there is a power which, in the event of a second
 marriage, would have enabled the wife to give the fund to
 the issue of a second marriage, if there should be no issue of
 the first marriage, who should become entitled to it. That
 is true." Then he goes on to say: "But she might never
 exercise that power, and I cannot believe that she could have
 intended to give her property in any event to her collateral
 relatives in preference to her own children by a second
 marriage; which, adopting the construction of the word
 'unmarried,' contended for by the appellant, must have
 been the result if she had had no issue by her first marriage,
 and had afterwards contracted, and had issue by, a second
 marriage, without making any fresh provision for them."
 Those words, as it seems to me, are extraordinarily apposite
 in the present case. Can it be supposed here, if I may repeat
 Lord Cranworth's words, that this lady intended to give this
 property in any event to her collateral relatives in preference
 to her own son by her first marriage, a consequence which
 necessarily follows from the construction placed by the
 learned judge upon the words "without having been
 married" in this settlement? I do not myself think so.
 But such a conclusion does not of course of itself suffice.
 One must inquire whether there is any other meaning, which,
 being properly attributed to the words in their context,
 would have the advantage of avoiding that result. If there
 is not the result must follow, however remote from the lady's
 intention it may be presumed to be.

Now in this settlement there are, I think, only two possible:

(1) 9 H. L. C. 614.

meanings which may be attributed to the words. The first is that adopted by the learned judge. That is: they are the equivalent of "without ever having been married at all." The second is that they mean "without having been married as aforesaid," or one may put it "without having been married now." Which of these meanings is here correct? That is the question. And first, is there any ambiguity in the phrase "without having been married" standing alone? Must it necessarily mean without ever having been married? Now apart from a context I think it must. If I say of A. B., A. B. died without having been married, I mean, and necessarily mean, without ever having been married. But there is high judicial authority for saying that in a marriage settlement the words *may* have another meaning—that is, the second meaning given above. For this limited purpose, *Wilson v. Atkinson* (1) may, I suppose, still be referred to, where that very statement is made by Knight Bruce L.J. One reason why the words may be properly susceptible of that construction in such an instrument is I apprehend that, in a marriage settlement, you are primarily concerned with one marriage only—namely, the marriage in contemplation—and accordingly it may be permissible as a matter of sound construction to confine references to marriage in it, which are in terms apparently general, to that contemplated marriage alone, on the same principle as in *In re Hancock* (2) in the Court of Appeal the words "my wife" were held to be restricted to the lady who was then the settlor's wife, and not to extend to any future wife of his, although it must be agreed that, apart from a context, a lady to whom her husband is married is for the time being as much his wife as is any lady earlier in the succession. Accordingly, in my view, it is with reference to the context that you must ascertain what these words in this marriage settlement mean, and in order to assist in arriving at that meaning I ask myself, just as Cozens-Hardy L.J. did in *In re Brydone's Settlement* (3), what, reading the settlement

C. A.
1920
ELLIS'S
SETTLEMENT,
In re.
WASBROUGH
v.
BOYCE.
Younger L.J.

(1) 4 D. J. & S. 455.

(2) [1896] 2 Ch. 173.

(3) [1903] 2 Ch. 84.

C. A. as a whole, must be regarded as the purpose of the clause
1920 in which the words occur ?

ELLIS'S
SETTLEMENT,
In re. Now the clause declares the last trust of all with reference
to the wife's property. It is only operative after all the
WASBROUGH other trusts in relation to that property have, so far as the
v. settlement purposes are concerned, been exhausted and ful-
BOYCE. filled. These purposes fulfilled, the object of this clause is to
Younger L.J. define how the wife's next of kin, the persons designated to take
the residue not previously disposed of, are to be ascertained.
These next of kin are in the words of the clause to be "such
person or persons as under the statutes for the distribution
of the effects of intestates would have become entitled thereto
at the decease of the said Mary Royce had she died possessed
thereof intestate and without having been married." Now
reading these words in their place in this settlement, it would
appear to me, apart from all authority, that what is meant
is that the settlor's next of kin are to be ascertained as if
those persons brought into existence as a result of the then
intended marriage, and whose claims upon the fund have
been satisfied by the previous provisions of the settlement,
had never existed at all. The clause is a common form
clause ; and it is so framed as to be suitable for insertion
in a marriage settlement without reference, so far as its form
goes, to any particular circumstances, such as spinsterhood,
or widowhood, affecting the settlor at its date ; and so
regarding it (and one is entitled so to regard such a clause)
it becomes, I think, plain that its purpose is to provide for
a hypothetical class of next of kin, ascertained as if the
contemplated change in the status of the settlor had not
taken place—the change that is brought about under and by
virtue of the marriage into which she is about to enter.
In other words the purpose and result of the clause is to
redress in the hypothecated intestacy the disturbance created
by the only marriage that the settlement contemplates ;
quoad ultra, her next of kin are to be ascertained as if the lady's
status had remained unaltered by that change. I think
it is agreed—at least it was not contended to the contrary—
that there is good sense in this view. One looks in vain

for any intelligible reason why in the general case—and this clause is in its essence, as I have said, a common form clause—after the interests in the fund of those brought into existence as a result of the proposed marriage have been fully satisfied, and after, in this case, the lady's general appointees have also been satisfied, a provision similar to that existing and commented upon by Lord Cranworth in *Clarke v. Colls* (1) as above, any further disturbance should be created among the next of kin to take than that involved by the exclusion of those brought into existence as a result of the proposed marriage and already provided for under the prior purposes of the settlement. Why if, at the date of the settlement, the settlor is a widow with children of an earlier marriage or of earlier marriages, or why if, as here, she has a child by a divorced husband, she should choose the occasion of a further marriage, after satisfying all claims upon the fund brought into existence in consequence of it, to divert the residue from her own existing children or from her children of a still later marriage to remoter relatives, it is difficult indeed to see. Can it be doubted that any such diversion is entirely foreign to the transaction in hand, and, in the normal case, beyond contemplation? I, myself, think not, and, as I read this settlement, I see nothing in its terms, or, in their context, in these words, “without having been married,” which requires me to attribute to it such a result. I go so far as to say that to extend these latter words to any marriage other than that then in immediate contemplation would be to set them in this settlement in a place apart. For no other marriage than the marriage then contemplated is elsewhere referred to or mentioned in the document from beginning to end. In these circumstances not to read them as meaning “without having been married as aforesaid” would result in extending them to a marriage nowhere else referred to. In my judgment it is permissible construction most strictly conceived in these circumstances to imply in this instrument those referential words; and the result of doing so is to achieve a purpose, so far as the

C. A.
1920
ELLIS'S
SETTLEMENT,
In re.
WASBROUGH
v.
BOYCE.
Younger L.J.

(1) 9 H. L. C. 601.

C. A.
1920
ELLIS'S
SETTLEMENT,
In re.

WASBROUGH
v.
BOYCE.
Younger L.J.

lady's children are concerned, as immediately within Lord Cranworth's words in *Clarke v. Colls* (1), as was the object there achieved by the construction placed by the House of Lords on the settlement then before it.

Now I come to say a word about the authorities. A consideration of the cases cited yesterday leads me to think that this interpretation, which I am now venturing to suggest as the correct one, would be easily reached everywhere to-day, were it not that, under the so-called rule in *Wilson v. Atkinson* (2), the Courts, in their anxiety to provide for the children of the intended marriage, in a long series of cases were led to attribute to these words "without having been married" a construction that they cannot, as I agree, possibly bear. It must, however, be remembered that the supposed rule in *Wilson v. Atkinson* (2), now rejected, did not place upon these words the construction I have here suggested. Its effect was to place upon the words "without having been married" the meaning "without leaving a husband her surviving"; that is to say, the Courts treated the words as the equivalent of the word "unmarried," in the sense in which that word was construed in *Clarke v. Colls* (1), and they were led to that construction by the view they took that, the object of the clause being to defeat the husband only, it was permissible to construe it in a way which would have that result. Now I entirely agree that such a construction was quite inadmissible; the words will not bear it. Moreover if the sole purpose of the clause was to exclude the husband—and its purpose as I have endeavoured to explain is as I think plainly not so confined—it was quite unnecessary to strain the meaning of the actual words, for the husband is not one of his wife's statutory next of kin, as Warrington L.J. has just pointed out. Accordingly I concur entirely in the view that, if *Wilson v. Atkinson* (2) did so decide as a general principle—I myself doubt very much whether it actually did—then that case can only properly be regarded as a decision on its own special circumstances, and any observations propounding any such general principle must

(1) 9 H. L. C. 601.

(2) 4 D. J. & S. 455.

be treated as obiter dicta. But I would again repeat that this in no way discounts the correctness of the construction I now suggest, and it would in my view be unfortunate if the disaster which has overtaken that impugned general principle should be supposed to involve in its destruction the very different construction of the words here suggested, a construction which, as I think, is capable of being justified on the strictest principles of correct interpretation.

But that supposed principle while it remained operative had another result the effect of which still remains, and must be appreciated, if the bearing of the remaining authorities is to be fully understood. The principle obscured the inherent distinction in a marriage settlement between the phrase "without having been married" and the other phrase, of frequent occurrence, "without ever having been married." As it seems to me these phrases are used, in such a context, with markedly different results. Sargant J. says in his judgment that there can be no question that the words "without having been married" are much more flexible than such a phrase as "without ever having been married." One may, I think, properly go further. For example, if the words in this settlement—a settlement by a lady previously married at its date—had been "without ever having been married," I should not, in principle, have considered it permissible to imply, as matter of construction, the presence of the additional words, "as aforesaid." The words standing alone would have been too unambiguous to allow of the implication of such an addition. But if the words "without having been married" were the equivalent, as the so-called principle in *Wilson v. Atkinson* (1) assumed that they were, of the word "unmarried," in the sense of "without leaving a husband her surviving," equally the words "without ever having been married" would bear that meaning also. The principle, therefore, obliterated the distinction between the phrases, which, in a marriage settlement, I think plainly exists apart from it.

C. A.
1920
ELLIS'S
SETTLEMENT,
In re.
WASBROUGH
v.
BOYCE.
Younger L.J.

(1) 4 D. J. & S. 455.

C. A. Further, this distinction has a tendency to be blurred by
 1920 the further consideration that, in very many cases, the actual
 ELLIS'S result, so far as the settlor's children are concerned, is the
 SETTLEMENT, same whichever expression be used. In the case of a spinster
In re. settlor, except in the somewhat rare case of her children
 WASBROUGH by a future marriage, there is no real difference in the result,
v. whichever of the two phrases be employed. In the case of
 BOYCE. a widow with children, however, it makes, or may make,
 Younger L.J. all the difference which phrase is used. In these circum-
 stances it is at least notable that no English case, until the
 present, is to be found in which the children of a widow by an
 earlier marriage have been excluded, unless the words of the
 settlement were "without ever having been married," and
 if the distinction in a context between that phrase and the
 phrase with which we are now concerned have its proper
 importance attributed to it, it will, I think, be found that
 what I conceive to be the permissibly proper construction of
 the latter phrase is in harmony with all the decisions which
 are still the law of the Court, although, I agree, not in
 harmony with all the reasons given for them. My view of
 the words is, of course, consistent with the fact that *In re*
Ball's Trusts (1) must be regarded as overruled; while *In re*
Arden's Settlement (2), *Stoddart v. Saville* (3), *In re Forbes* (4),
 truly the high watermark of the decisions, and *In re Mare* (5),
 were, according to my view, all wrongly decided, as the
 Court of Appeal has, in effect, already held. It has, however,
 I need hardly insist, still to be remembered that the grounds
 for these decisions depend on quite a different construction
 being placed upon such words as "without having been
 married" from that which I attribute to them. In my
 view, agreeing as I do with the criticisms that have been
 passed on these cases, the words "without having been
 married" must, in the absence of a most particular context,
 always exclude the children of the intended marriage as
 among the next of kin who are to take, and that not only

(1) 11 Ch. D. 270.

(3) [1894] 1 Ch. 480.

(2) [1890] W. N. 204.

(4) [1899] W. N. 6.

(5) [1902] 2 Ch. 112.

because the plain words do exclude them, but also because, as I venture to suggest for the reasons I have given, the presumed intention of the clause excludes them too, as being already provided for under the prior trusts. Further, no difficulty is put in the way of the construction I suggest by, for instance, *Emmins v. Bradford* (1), although I agree that Sir George Jessel in that case did not decide the matter on a ground so simple as, if I be right, he might have done. It will, however, be remembered that he was there still combating the so-called principle which, as I have shown, was equally applicable to the words "without ever having been married," with which he had there to deal, as to the words here. Nor again is the view I am putting forward affected by the decision of Swinfen Eady J. in *In re Smith's Settlement* (2), because that decision ought to have been the same even if the words had not been, as they were, "without ever having been married," but had been "without having been married." For that was the case of the marriage of a spinster, and the only children in question were the children of the intended marriage. Nor again, so far as I understand the case, does the view I have expressed conflict with anything stated by the Court of Appeal in *In re Brydone's Settlement*. (3) In my view, as I have already said, the words "without having been married" do prima facie necessarily exclude, that is, apart from some special context, the children of the intended marriage. Whether they exclude the children of an earlier marriage did not arise, and was not considered by the Court of Appeal in *In re Brydone's Settlement* (3), and that question depends, as I have endeavoured to show, on quite different considerations. That that matter was not directly present to the mind of the Court of Appeal is, I think, really shown by a short passage from the judgment of Cozens-Hardy L.J. where he says: "On the construction of this particular clause I doubt whether, apart from authority, any person in Court would hesitate as to its meaning. It seems to me almost too plain for argument that the fund is to go to an artificial class

C. A.
1920
ELLIS'S
SETTLEMENT,
In re.
WASBROUGH
v.
BOYCE.
Younger L.J.

(1) 13 Ch. D. 493.

(2) [1903] 1 Ch. 373.

(3) [1903] 2 Ch. 84, 96.

C. A. of persons to be ascertained on the footing that the lady never
 1920 had been married, but had remained a spinster all her life.”
 ELLIS'S I am not certain that the learned Lord Justice had not in
 SETTLEMENT, his mind the view of the clause I have endeavoured to express.
In re.
 WASBROUGH It is, however, safer to say, which is undoubted, that that
 v.
 BOYCE. question was not before the Court.
 Younger L.J. Further, and lastly, the view I have taken is in exact

accordance with the result reached by Fry J. in *Upton v. Brown* (1) if not with the reasons for that decision.

The only remaining case cited to which perhaps I ought to refer is the Irish case of *Hardman v. Maffett*. (2) It does not appear, however, that the considerations which appear to me to be of paramount significance in this matter were either brought to the attention of the Master of the Rolls in Ireland, or dealt with by him. It seems superfluous, therefore, to discuss the terms of his judgment, which is not, of course, binding on this Court.

If I am so far right it will, of course, become at once apparent that the existence of the contemporaneous settlement has no effect upon the result. The contemporaneous settlement does undoubtedly provide for the child of the first marriage, but I cannot myself see how any real reliance can be placed on that settlement for the purpose of saying that it indicates that this lady intended that her child should have no interest as one of her nearest of kin in the undisposed of residue of her settled property. It is, I think, reasonably plain that one main purpose of the settlement on the child was to set aside a fund in which the second husband would have no life interest, and inasmuch as at the date of her marriage settlement the lady could never know who her next of kin would be, or how well off they might be, or how poor, it is difficult to suppose she intended that that indeterminate class of remoter relatives should override the claims of her only son, for whom she had provided to the extent merely of 5000*l*.

For these reasons, I am of opinion that this child, the appellant, is now entitled to the trust fund, and if the matter

(1) 12 Ch. D. 872.

(2) 13 L. R. Ir. 499.

rested with me I would be for allowing the appeal. But I have had great hesitation in enunciating the view I have stated having regard to the conclusion, adverse to it, reached by my Lord, the Lord Justice and Sargant J. Having, however, rightly or wrongly, made up my mind that it is well founded I have deemed it to be my duty to give expression to it, even although, in the result, it has no effect on the decision of this appeal.

C. A.
1920
ELLIS'S
SETTLEMENT,
In re.
WASBROUGH
v.
BOYCE.
—

Appeal dismissed.

Solicitors : *Stanley & Co., for Stanley, Wasbrough, Doggett & Baker, Bristol ; Vizard, Oldham, Crowder & Cash ; Sharpe, Pritchard & Co., for W. Walker, Manchester ; Murr, Rusby & Archer, for Sharpe, Darby & Millichip, West Bromwich ; Field, Roscoe & Co., for Bubb & Co., Cheltenham.*

G. A. S.

In re SUTTON.

BOSCAWEN *v.* WYNDHAM.

[1920. S. 1570.]

P. O.
LAWRENCE
J.
1920
Oct. 22, 27,
28 ;
Nov. 10.
—

Will—Settled Legacy—Power for Trustees with Consent of Legatee to revoke Trusts and resettle—Legatee an Infant—Power Appendant—Validity of Infant's Consent—Ultimate Trust.

A testator by his will settled a legacy of 50,000*l.* upon usual trusts for A., his wife and issue, and declared that if no issue of A. should attain a vested interest then the legacy should fall into and form part of his (the testator's) residuary estate, and the testator empowered the trustees on A.'s marriage and with his consent to revoke the trusts and to resettle the legacy upon such trusts for the benefit of A., his wife and issue, and with such powers and provisions as the trustees should deem proper. By a codicil the testator bequeathed a sum of 50,000*l.* to his trustees to be held by them upon the trusts and with powers for the benefit of B., her husband and issue, similar to those for the benefit of A., his wife and issue, declared in his will concerning the 50,000*l.* thereby settled, except that no part of the capital was to be paid or advanced to or for the benefit of B.

Both A. and B. were infants at the date of the will. After the death of the testator B. married, being still an infant, and by a deed executed

P. O.
LAWRENCE
J.
1920
SUTTON,
In re.
BOSCAWEN
v.
WYNDHAM.

in contemplation of her marriage the trustees with her consent and in exercise of the power conferred on them by the will and codicil revoked the trusts of her legacy and resettled the same upon trusts for her benefit, and her husband and issue, which varied somewhat from those declared in the will; in particular the ultimate trust in default of her issue was for her absolutely. On the question whether the resettlement was valid having regard to the fact that B. was an infant:—

Held, that upon the true construction of the will and codicil the testator intended to confer a power on B. during her minority to consent to an exercise by the trustees of their power of revocation and resettlement, and that he could lawfully confer such a power upon her.

In re Cardross's Settlement (1878) 7 Ch. D. 728 followed.

But *held*, that the ultimate trust in the resettlement, in default of B.'s issue for B. absolutely, was prohibited by the codicil, and therefore not authorized by the power to resettle.

ADJOURNED SUMMONS.

Sir R. V. Sutton, Bart., by his will dated August 16, 1915, bequeathed to his trustees (the plaintiffs) a legacy of 50,000*l.* upon the trusts thereafter declared for the benefit of his half brother, P. R. Astley, and his issue. And the testator declared that the sum of 50,000*l.* bequeathed to his trustees for the benefit of his half brother, and his issue, should be held upon trust with the half brother's consent in writing if living and of full age and at any other time at the discretion of the trustees to invest the same and to vary the investments thereof as therein mentioned and the testator directed his trustees to stand possessed of the said sum of 50,000*l.* and the investments for the time being representing the same (thereinafter called "the said legacy") upon trust to pay the income thereof to the half brother during his life and after his death in trust (as to capital and income) for his issue as he should by deed or will appoint. And in default of appointment in trust for his children and remoter issue as therein mentioned. And the testator declared that if no child or other issue of the half brother should attain a vested interest under the trusts thereinbefore contained then subject to the said trusts the said legacy and all accumulations of income thereof (if any) should fall into and form part of his residuary estate. And (after giving the half brother a power to appoint a life or any less interest to any wife of his who might survive him) the testator declared that his trustees should have power

from time to time to raise out of the said legacy such sum or sums as they think fit not exceeding altogether the sum of 10,000*l.* and to pay the same to the half brother for his absolute benefit. And the testator also empowered his trustees with the consent of the half brother in contemplation of his marriage to revoke the trusts thereinbefore declared concerning the said legacy and to resettle the same upon such trusts for the benefit of the half brother, his wife and issue, and with such powers and provisions as the trustees should deem proper.

P. O.
LAWRENCE
J.
1920
SUTTON,
In re.
BOSCAWEN
v.
WYNDHAM.

By a codicil dated April 8, 1918, the testator bequeathed to his trustees the sum of 50,000*l.* and the testator declared that the same sum should be held by them upon the trusts and with powers for the benefit of his half sister Ruth C. Astley her husband and issue similar to those for the benefit of his half brother, his wife and issue, respectively declared by and contained in his will concerning the said sum of 50,000*l.* thereby settled "except that no part of the capital is to be paid or advanced to or for the benefit of my said half sister." The testator died on November 29, 1918.

The testator's half brother P. R. Astley was born on June 9, 1896, and the testator's half sister Ruth C. Astley was born on March 5, 1900.

On April 14, 1920, Ruth C. Astley married Captain Wyndham. In contemplation of this marriage a deed-poll dated April 13, 1920, was executed by the plaintiffs and by Ruth C. Wyndham (therein described as Ruth C. Astley, spinster, an infant). By this deed the plaintiffs (with the consent thereby testified of Ruth C. Wyndham) in exercise of the power conferred upon them by the testator's will and codicil resettled the legacy of 50,000*l.* bequeathed to them upon trust for the benefit of Ruth C. Wyndham, her husband and issue. The provisions of this resettlement so far as they are material were to the following effect. The wife took the first life interest, without power of anticipation, after her death the husband took a life interest, on the death of the survivor the capital was to be held in trust for the children or remoter issue of the marriage as the wife and husband

P. O.
LAWRENCE
J.
1920
SUTTON,
In re.
BOSCAWEN
v.
WYNDHAM.

should by deed jointly appoint and in default of such appointment as the survivor should by deed or will appoint, and in default of such appointment, In trust for the children of the intended marriage sons at twenty-one and daughters at that age or marriage in equal shares. Then followed provisions in favour of the issue of any future marriage of the wife, and the ultimate trust in default of any child of the wife attaining a vested interest was as follows: "If there shall be no child of the said intended or any other marriage of the wife who shall attain the age of twenty-one years or being female shall marry under that age then subject to the trusts powers and provisions hereby declared and contained and to the powers by law vested in the trustees and to every exercise of such respective powers the trustees shall stand possessed of the trust legacy in trust for the wife absolutely." The resettlement also contained an investment clause, a power at the request of the wife to lay out a sum not exceeding 5000*l.* in the purchase of a residence, a declaration that the trusts, powers and provisions by and in the will declared and contained concerning the legacy should stand revoked so far as necessary to give effect to the resettlement but not further or otherwise, and a provision that the trustees should submit to the Chancery Division of the High Court of Justice the question whether upon the true construction of the testator's will the resettlement was a valid exercise of the power in that behalf contained in the will, especially having regard to the fact that the wife was under the age of twenty-one years. In pursuance of the last mentioned provision the plaintiffs issued the present summons against Mrs. Wyndham and C. R. Sutton (who was an infant and had a substantial interest in the testator's residuary estate). The testator's estate was amply sufficient to provide for the legacies.

B. Leveson for the plaintiffs.

Owen Thompson K.C. and *J. Stirling* for Mrs. Wyndham. There is not much authority on the question whether an infant can give her consent to the exercise of a power. The

giving of the consent is in itself in the nature of a power. An infant cannot exercise a power over real estate, but he can exercise a power over personal estate in certain cases: *In re D'Angibau*. (1) In that case Sir George Jessel M.R. classifies them as a power collateral, a power in gross and a power appendant. The same judge had previously held in *In re Cardross's Settlement* (2) that an infant can exercise a power coupled with an interest where the donor of the power contemplates that it should be exercised during minority, although in that case the consent was only required to a change in investments. Here the power is coupled with an interest, which is a power appendant, and it is submitted that the testator intended that it should be exercisable during minority. Secondly, the ultimate trust is part of the trusts of the legacy and under the power of revocation and resettlement the trustees had power to deal with it. The exception in the codicil is not directed to the ultimate trust but to the power of advancement in the trusts of the brother's legacy and was intended to prohibit any similar advancement to Mrs. Wyndham. The testator did not contemplate the ultimate trust at all, and the trustees had an absolute power to alter the ultimate destination of the legacy for the benefit of the infant.

P. O.
LAWRENCE
J.
1920
SUTTON,
In re.
BOSCAWEN
v.
WYNDHAM.

Jenkins K.C. and *E. W. Lavington* for the residuary legatee. The law as to the capacity of an infant to exercise a power is summarised in Halsbury's Laws of England, vol. xvii., pp. 53-4, where the authorities are collected. So far as they go they show that a power appendant may be exercised by an infant where it clearly appears that the creator of the power intended it should be exercised by the donee of the power during infancy, and it is submitted that that should be either specially directed or should be a necessary inference. Pearson J. in *In re Duke of Newcastle's Estates* (3) seems to have doubted *In re Cardross's Settlement*. (4) In the Irish case of *In re Armit's Trusts* (5) it was decided that a power cannot be exercised by an infant so as to divest

(1) (1880) 15 Ch. D. 228, 232.

(3) (1883) 24 Ch. D. 129, 136.

(2) 7 Ch. D. 728, 731.

(4) 7 Ch. D. 728.

(5) (1871) I. R. 5 Eq. 352.

P. O.
LAWRENCE
J.
1920
SUTTON,
In re.
BOSCAWEN
v.
WYNDHAM.

himself of any estate or interest, but the decision is criticised in Farwell on Powers, 3rd ed., p. 142. *In re Cardross's Settlement* (1) was in the nature of a power appendant but was only a power to consent to a change of investments which distinguishes it from the present case. *In re D'Angibau* (2) was a power in gross. Moreover, both of those cases were settlements by deed and the present case is a settlement by will which is ambulatory and might not have come into operation for many years, and Cotton L.J. in *In re D'Angibau* (2) observes that the mere fact that a power, which may not have to be exercised for many years, is given to an infant is not a sufficient indication of intention that it should be exercisable during infancy. It is submitted that on the construction of the will and codicil there is not a clear indication that the power should be exercised during infancy. Secondly, the ultimate trust is not part of the trust of the legacy, and the trustees had no power to revoke the ultimate trust and, on failure of Mrs. Wyndham's issue, to divert the corpus of the legacy from the residuary legatee to Mrs. Wyndham. But if the ultimate trust is part of the trusts of legacy, the codicil expressly prohibits any part of the capital being directly or indirectly taken away for the benefit of Mrs. Wyndham. The testator obviously intended that, on failure of her issue, the corpus should fall into residue.

Owen Thompson K.C. in reply.

Cur. adv. vult.

Nov. 10. P. O. LAWRENCE J. stated the facts and said: It will be seen that the resettlement of April 13, 1920, not only purports to vary the trusts of the 50,000*l.* legacy by the joint operation of the will and codicil declared in favour of Mrs. Wyndham her husband and issue, but also the ultimate trust in default of issue declared in favour of residue. On behalf of the infant residuary legatee it is claimed that the whole resettlement, or in the alternative that the ultimate trust thereby declared in favour of Mrs. Wyndham, is void and inoperative.

I will deal first with the question whether the whole

(1) 7 Ch. D. 728.

(2) 15 Ch. D. 228, 241.

resettlement is void. This claim is based on the fact that Mrs. Wyndham was a minor when the resettlement was executed. It has been assumed by counsel for both defendants, following in this respect *In re Cardross's Settlement* (1), that the giving by Mrs. Wyndham of her consent to the resettlement was equivalent to an execution by her of a power purporting to be conferred upon her by the testator, and I propose to deal with the case on that assumption. The questions to be decided on this part of the case are, first, whether on the true construction of the will and codicil the power of revocation and resettlement conferred on the trustees was intended by the testator to be exercisable by them during Mrs. Wyndham's minority; and secondly, if the testator has purported to confer such a power upon the trustees, whether he could lawfully do so seeing that it involved conferring a power upon Mrs. Wyndham during her minority the exercise of which might affect her interest in the legacy. In ascertaining whether the testator purported to confer upon his trustees a power of revocation and resettlement exercisable during the minority of Mrs. Wyndham it is not unimportant to observe that, to the knowledge of the testator, his half brother P. R. Astley was a minor when the testator made his will and his half sister Mrs. Wyndham was a minor when he made his codicil. I agree that too much weight must not be attached to this fact, as a testamentary instrument, unlike a deed, does not become operative immediately on its execution, but as against this it is apparent on the face of the will that the testator (who was an officer in the British Army engaged on active service in the European War at the time when he made both his will and his codicil) contemplated that the will might become effective during the minority of P. R. Astley as he authorizes his trustees to invest and vary the investments of the trust legacy of 50,000*l.* with the consent in writing of his half brother if living and of full age and at any other time (which would include the period whilst P. R. Astley was a minor) at the discretion of the trustees. But apart from this fact I attach the greatest weight to the

P. O.
LAWRENCE
J.

1920

SUTTON,
In re.

BOSCAWEN
v.

WYNDHAM.

(1) 7 Ch. D. 728:

P. O.
LAWRENCE
J.
1920
SUTTON,
In re.
BOSCAWEN
v.
WYNDHAM.

fact that the power is one which is exercisable on a particular occasion—namely, in contemplation of marriage. There is nothing in the will to expressly confine the exercise of the power to a marriage after either the half brother or the half sister has attained twenty-one years of age. The marriage of an infant of either sex is of common occurrence. In every well-drawn will and settlement the marriage of a female infant is treated as a commonplace event. From the nature of the power itself I consider that I am justified in coming to the conclusion that it is evident that the testator must have contemplated that it should be exercised during Mrs. Wyndham's minority if the occasion for its exercise during that period should arise. On this part of the case therefore I hold that the testator by his will and codicil purported to confer a power upon Mrs. Wyndham during her minority to consent to an exercise by the trustees of their power of revocation and resettlement. The next question which arises is whether the testator could lawfully confer such a power upon Mrs. Wyndham. A testator cannot of course alter the status of a minor nor can he confer upon a minor powers of disposition or alienation which the law does not allow. I have therefore to consider whether the law permits a minor to exercise such a power to consent as was purported to be conferred upon Mrs. Wyndham in this case. In my judgment this question is covered by the decision of Sir George Jessel in *In re Cardross's Settlement*. (1) The power conferred in the present case upon Mrs. Wyndham is admittedly a power appendant falling under the third head in the classification of powers contained in the judgment of Sir George Jessel in *In re D'Angibau*. (2) That learned judge in *In re Cardross's Settlement* (1) held that such a power can be exercised by a minor where an intention appears that it should be exercised during minority, and his decision has never been overruled and I consider myself bound by it. Mr. Jenkins sought to distinguish that case from the present on the ground that the power conferred on the minor in *In re Cardross* was merely a power to consent to the trustees varying the investments of

(1) 7 Ch. D. 728. .

(2) 15 Ch. D. 228, 232.

the trust fund, whereas in the present case the power purporting to be conferred on Mrs. Wyndham is a power to consent to the trustees varying her beneficial interest. In my judgment however there is no distinction in principle between the two cases. It is obvious from the judgment of Sir George Jessel that he considered the power in *In re Cardross's Settlement* (1) to be a power appendant, and it appears from the judgment of the same learned judge in *In re D'Angibau* (2) that he considers a power appendant to be a power exercisable by a person who has an interest in the property which interest is capable of being affected, diminished and to some extent disposed of by the exercise of the power. But then it is said that the judgment of Sullivan M.R. in the Irish case of *In re Armit's Trusts* (3) shows that a minor cannot exercise a power appendant so as to defeat his interest in the property, and that in this case Mrs. Wyndham has by assenting to the resettlement of April 13, 1920, defeated her interest in the legacy within the meaning of that decision. Although I am not bound by the decision in *In re Armit's Trusts* (3) I will assume for the purposes of this case that it states the law correctly and accordingly that a minor cannot exercise a power appendant so as to defeat his interest in the property. In my opinion however the power given to Mrs. Wyndham in the present case was not a power which would enable her to defeat her interest in the legacy nor does the resettlement of April 13, 1920, in fact operate to defeat such interest. If the learned judge intended to hold that every power conferred on a minor which authorizes any variation or diminution of the minor's interest in the property is bad, because it enables the minor to defeat his interest in the property, the decision is in my judgment in direct conflict with the law as stated by Sir George Jessel in *In re Cardross's Settlement* (1) and *In re D'Angibau*. (2) But I do not think that Sullivan M.R. intended to go so far as that. My conclusion that in the present case Mrs. Wyndham's interest in the legacy has not been defeated by the resettlement is

P. O.
LAWRENCE
J.
1920
SUTTON,
In re.
BOSCAWEN
v.
WYNDHAM.

(1) 7 Ch. D. 728.

(2) 15 Ch. D. 228.

(3) I. R. 5 Eq. 352.

P. O.
LAWRENCE
J.
1920
SUTTON,
In re.
BOSCAWEN
v.
WYNDHAM.

based on the fact that the only way in which her interest has been affected is that she has been prevented from anticipating it during coverture, and that a power has been conferred on the trustees with her consent to invest part of the trust funds in the purchase in their names of a residence. Both these variations are made for her own benefit and not for the benefit of any third party, the former to make her interest in the legacy more secure and the latter to enable her to enjoy it to greater advantage. In no way has her beneficial interest in the legacy been diminished or disposed of. On both these grounds therefore I consider that the argument based on the decision of *In re Armit's Trusts* (1) has no application to the facts of the present case. In the result I hold that the testator could lawfully confer upon Mrs. Wyndham a power to consent to a resettlement of the legacy bequeathed in her favour exercisable during her minority.

It remains to be considered whether the ultimate trust in the resettlement in favour of Mrs. Wyndham was authorized by the power. On behalf of the residuary legatee it is contended, first, that on the construction of the will (apart altogether from the codicil) the power of revocation and resettlement given to the trustees does not extend to the declaration contained in the will that on failure of issue the legacy should fall into and form part of the testator's residuary estate; and secondly, if that contention be wrong, that the direction contained in the codicil that no part of the capital is to be paid to or advanced for the benefit of Mrs. Wyndham precludes the trustees from inserting in the resettlement any valid trust of any part of the capital of the legacy in favour of Mrs. Wyndham. Both the questions thus raised are purely questions of construction. The first may be stated thus: Is the declaration contained in the will that in the event therein mentioned the legacy should fall into and form part of the residuary estate "one of the trusts hereinbefore declared concerning the said legacy" within the meaning of that expression when used in the power

(1) I. R. 5 Eq. 352.

of revocation? Mr. Jenkins has argued that it is not, and that the power of revocation is intended to operate only on the trusts preceding the declaration that the legacy shall fall into residue. I feel myself unable to accede to this argument. The power of revocation is not in terms confined to any particular trusts which precede it but extends to all those trusts, and I am clearly of opinion that the declaration as to the ultimate destination of the legacy is a trust "concerning" the legacy. The word "concerning" used in this context is in my opinion synonymous with "affecting." It is true that on the ultimate trust in favour of residue becoming operative the legacy will merge in the residue and will thereafter cease to exist as such, but none the less the declaration that it should so merge is in my opinion a trust declared which "concerns" the legacy within the ordinary and natural acceptation of that expression. On the construction of the will, therefore, I hold that the power of revocation conferred upon the trustees extends to the ultimate trust in favour of residue.

P. O.
LAWRENCE
J.
1920
SUTTON,
In re.
BOSCAWEN
v.
WYNDHAM.

The last question which I have to determine is whether the ultimate trust in favour of Mrs. Wyndham is contrary to the express provisions of the codicil and therefore void. It may well be, as was suggested in argument, that the primary object of the testator in inserting in his codicil a prohibition against paying or advancing any part of the capital of the legacy to or for the benefit of Mrs. Wyndham was to exclude from the settlement of Mrs. Wyndham's legacy the power which was contained in the will in the case of the half brother's legacy to raise a sum not exceeding 10,000*l.* out of such legacy for the half brother. But whatever may have been the motive for the insertion of the prohibition my duty is to construe the words used by the testator according to their natural meaning. The prohibition is inserted at the end of the clause relating to Mrs. Wyndham's settled legacy and is expressed to be an exception from the trusts and powers (which include the power to resettle) therein by reference declared and contained concerning such legacy. I understand this prohibition to mean that no part of the capital

P. O.
LAWRENCE
J.

1920

SUTTON,
In re.

BOSCAWEN

v.

WYNDHAM.

of the legacy is to be paid to Mrs. Wyndham either under the original trusts declared by the testator or under any substituted trusts declared by way of resettlement, and I can find nothing in the codicil which would justify me in holding that the prohibition is confined to a payment or advance under any particular provision in the will. But Mr. Thompson further contends that the ultimate trust in the resettlement is not a trust providing for the payment or advancement to or for the benefit of Mrs. Wyndham of any part of the capital of the legacy within the meaning of the prohibition contained in the codicil. His argument is that a trust whereby the trustees are directed to hold the capital of the legacy subject to Mrs. Wyndham's life interest and in default of her issue in trust for her absolutely is not a trust to pay to her any part of the capital of the legacy and therefore does not offend against the prohibition. In one sense no doubt that is true. If the trusts of the resettlement were carried out literally no payment of capital would be made to Mrs. Wyndham in her lifetime, even though she might become a widow past the age of childbearing and might never have had any issue, the trust as declared only resulting in payment of the capital of the legacy to her legal personal representatives or to her assigns after her death. In my opinion, however, the obvious meaning of the prohibition in the codicil is that it covers a payment of capital to any persons deriving title through Mrs. Wyndham as well as a payment to Mrs. Wyndham herself. I consider the true meaning of the words used by the testator to be that no part of the capital should be paid to either Mrs. Wyndham or to her executors, administrators or assigns; if it were otherwise, the prohibition could on a resettlement of the legacy be rendered wholly nugatory. The mere fact that the payment is one which may not have to be made until some future event happens cannot in my opinion affect the question, as the prohibition is not confined to any stated period of time but is absolute in terms. Lastly, the fact that the resettlement does not direct the trustees to pay the capital of the legacy over to Mrs. Wyndham but merely directs it to be held

in trust for her does not in my opinion prevent it from being obnoxious to the prohibition, because under such a trust Mrs. Wyndham or her legal personal representatives or her assigns would be entitled as of right to demand payment directly it became operative and in certain circumstances the trustees might even be compelled to pay it over to Mrs. Wyndham in her lifetime. For the reasons I have indicated I hold that the ultimate trust in the resettlement in favour of Mrs. Wyndham is contrary to the provisions of the codicil and therefore not authorized by the power to resettle, and accordingly that the resettlement must be read and take effect as if that trust had been omitted from it. There will be a declaration to the effect that the resettlement is valid and operative, except as to the ultimate trust declared concerning the capital of the legacy in favour of Mrs. Wyndham.

P. O.
LAWRENCE
J.
1920
SUTTON,
In re,
BOSCAWEN
v.
WYNDHAM.

Solicitors: *Clarke, Clarke & Square; Corbould, Rigby & Co.*

H. L. F.

In re NIERHAUS, ENEMY. (1)

RUSSELL
J.

[MANCHESTER DISTRICT REGISTRY.]

1920
Mar. 10, 18.

[1917. N. 695.]

War—Emergency Legislation—Practice—Pre-war Debt due from German National to British National—Recovery—Jurisdiction of Court—Trading with the Enemy Amendment Act, 1914 (5 Geo. 5, c. 12), s. 5, sub-s. 2—Treaty of Peace with Germany, Part X., Ss. III., IV.—Treaty of Peace Act, 1919 (9 & 10 Geo. 5, c. 33), s. 1—Treaty of Peace Order, 1919, s. 1, sub-ss. 1, 2, 3.

By reason of the Treaty of Peace Act, 1919, the Treaty of Peace Order, and the Treaty of Peace with Germany (which came into force on January 10, 1920), the power, conferred by s. 5, sub-s. 2, of the Trading with the Enemy Amendment Act, 1914, on the Court to authorize the custodian to pay out of property paid to him in respect of an enemy debts due by that enemy, has, so far as concerns pre-war debts due by

(1) See the next following case.

RUSSELL
J.
1920

German nationals to British nationals, come to an end. Payment of such debts can now be made only through the clearing office established under S. III. of Part X. of the Treaty.

NIERHAUS,
In re.

By a vesting Order, made by the Court on May 17, 1917, under the Trading with the Enemy Acts, 1914 to 1916, on the application of Schill Bros., Ltd., various debts due to H. A. Nierhaus (an enemy within the Acts) were vested in the custodian, and it was ordered that an inquiry be made what was due from the enemy respondent to the applicants, and to any other and what persons within the United Kingdom, not being enemies within the meaning of the Trading with the Enemy Amendment Act, 1914, of whose claims against the enemy respondent the custodian might have notice. By the certificate, dated November 20, 1917, in answer to the inquiry it was certified that there was due from the enemy respondent to Schill Bros., Ltd., 1786 marks, and to Sutton & Co. 10*l.* 13*s.* 4*d.* On December 15, 1919, Schill Bros., Ltd., issued a summons asking that the custodian be at liberty to pay those debts. Though not specifically mentioned in the summons, the applicants claimed to be paid at the pre-war rate of exchange, and also to be paid interest at 5 per cent.

Clauson K.C. and *Gavin Simonds* for the applicants. The question is whether pre-war debts due from German nationals to British nationals can be paid now—i.e., after January 10, 1920, when war with Germany ended—in any way except through the clearing office. The answer is that they can. The Court still has power, under s. 5, sub-s. 2, of the Trading with the Enemy Amendment Act, 1914, to authorize the custodian to pay them out of money of the enemy in his hands. On the true construction of the Treaty of Peace Order, 1919 (1), and s. 5, sub-s. 2, of the Act of 1914, the jurisdiction of the Court is continued. Where the Court exercises its discretion and authorizes the custodian to pay, the custodian can still exercise his own discretion whether he will pay or not : *In re Fried Krupp Aktien-gesellschaft.* (2)

(1) The material provisions of the Treaty of Peace, the Treaty of Peace Act, 1919, and the Treaty of Peace

Order, 1919, are set out in the judgment.

(2) [1916] 2 Ch. 194.

Austen-Cartmell. But he does not generally do so.

Clauson K.C. German "national" in the Peace Order is a much wider term than "enemy" in the 1914 Act; it may include a German who has not even been interned. See also s. 15 of the Trading with the Enemy Amendment Act, 1916. It may be said for the custodian that the power of the Court under s. 5, sub-s. 1, of the 1914 Act also came to an end at the termination of war.

Austen-Cartmell. But it is not said at all. See s. 4, sub-s. 5, of 1916 Act.

Clauson K.C. The applicants cannot say that anything in the Peace Order is ultra vires. The Order has the force and effect of a statute. What it does is to deal with the effect of the Peace Treaty and the jurisdiction of the Court. If the Treaty does not take away the Court's jurisdiction, the Order does not. The property in the hands of the custodian is not "property belonging to a German national at the date when the Treaty comes into force": s. 1, sub-s. xvi., of the Order; *In re Ling & Duhr* (1); *In re Münster*. (2) The Order does not mean to overthrow the 1914 Act in one place when in the next sentence it sets it up. The effect of para. 3 of the Annex to Art. 297 is not only to confirm past acts of the Court, but also to continue its jurisdiction as to all steps which may be taken against Germans under s. 5 of the 1914 Act. There is nothing in the clearing office provisions of Art. 296 or the Order to show that the fund in the hands of the custodian necessarily goes to the clearing office. Reading Art. 296 in vacuo, no doubt the applicants' debt is within para. 1, but Art. 296 must be read with Arts. 297 and 298, which leave the jurisdiction of the Court under the 1914 Act existing. The whole of the Court's jurisdiction under that Act, past and future, is left outside the Order and is untouched. Para. 3 of the Annex to Art. 296 does not mean to take away the jurisdiction of the Court, but only means that where the clearing office is concerned the provisions as to the clearing office are to apply. The Annex is mere machinery applicable to debts which have to be dealt with through the clearing

RUSSELL
J.
1920
NIERHAUS,
In re.
—

RUSSELL
J.
1920
NIERHAUS,
In re.
—

office, but is unintelligible if applied to debts already dealt with by the 1914 Act. The applicants have the alternative of coming to the Court or going to the clearing office. If the Court should exercise its discretion in their favour, they could still go to the clearing office. If their view is right, the convenient and proper course for the Court to adopt in this case is to finish what it has begun and authorize the custodian to pay the debt. That may not be the course to adopt in the case of every new applicant. To him the Court may say, Go to the clearing office.

Sir Gordon Hewart A.-G. and *Austen-Gartmell* for the custodian. First, the power of the Court under s. 5, sub-s. 2, of the Act of 1914 has come to an end. Secondly, if it has not and there are concurrent powers in the Court and the clearing office, the Court is asked, in its discretion, to lay down, as a rule of practice, that it is not convenient to have these matters dealt with by the Court. Thirdly, if the Court has jurisdiction to deal with the matter and exercises its discretion by doing so, it is asked to adopt the provisions of Art. 296 and the Annex thereto in the Peace Treaty as to payment in marks and interest at 5 per cent.

Para. 4 (a) of Art. 296 prohibits payment of pre-war debts otherwise than through the clearing office. That is a statement of law. The applicants appeal *ad misericordiam*. The power of the Court under s. 5, sub-s. 2, of the 1914 Act has been taken away by subsequent enactment—i.e., the Order—in words as clear and distinct as possible. Art. 297 completely overthrows the applicants' contention. Art. 296 with the Annex to it provides a complete code as to pre-war debts and the clearing office. It is "a reservation laid down in the present Treaty," Art. 297, para. (d). This country and Germany having adopted the clearing office procedure, the emergency legislation of the 1914 Act is superseded, Art. 296, para. 1 (e).

[RUSSELL J. Art. 297 is the proper procedure for countries which have not adopted the clearing office system.]

Exactly. That solves the whole difficulty. What has already been done by the Court, the Treaty confirms. Sect. 5,

sub-s. 2, of the 1914 Act is repealed by necessary implication. RUSSELL J.

But, if that is not so, the Court's jurisdiction has always been discretionary, and the discretion ought not to be exercised in favour of the applicants here. There is the new, elaborate and expensive machinery of the clearing office set up. From an administrative point of view it is most undesirable that there should be two methods of procedure. Further, it is very desirable that debts should go through the scrutiny of the German clearing office.

1920
NIERHAUS,
In re.

Formerly the Court could not allow interest except where interest had been agreed for by contract: *In re Fried Krupp Aktien-gesellschaft*. (1) Now the clearing office solves the difficulty for itself, though not for the Court. There is no legislative authority giving to the Court, assuming the Court has any jurisdiction in the matter, power to give interest at 5 per cent. The power is only given to the clearing office.

Clauson K.C. in reply. The exception of "reservations" in para. (d) of Art. 297 applies to "exceptional war measures"—namely, those mentioned in para. (j) of Art. 297 and Art. 298. The debt is made a debt which by statute bears interest. The Order really amends s. 5 of the 1914 Act, and the Court must allow interest. But if not, and if the Court has a discretion, it should allow interest.

Cur. adv. vult.

Mar. 18. RUSSELL J. [after stating the facts]. The application is one which asks the Court to exercise the power to authorize the custodian to pay debts due by an enemy, which is conferred by sub-s. 2 of s. 5 of the Trading with the Enemy Amendment Act, 1914 (hereinafter referred to as the Act of 1914). The Trading with the Enemy Amendment Act, 1916, empowered the Board of Trade to make orders vesting in the custodian property of an enemy or enemy subject, and applied s. 5 of the Act of 1914 as thereby amended to such property. The amendment referred to is immaterial to the present case. The custodian appears by the Attorney-General

(1) [1916] 2 Ch. 194; [1917] 2 Ch. 188.

RUSSELL
J.
1920
NIERHAUS,
In re.

and Mr. Austen-Cartmell, and they take the point that the power aforesaid has, so far as concerns debts due by German nationals to British nationals, come to an end by reason of the Treaty of Peace Act, 1919, the Treaty of Peace Order, 1919, and the Treaty of Peace between the Allied and Associated Powers and Germany. The point which I have to decide is whether that power is still in existence or whether it has come to an end.

The Treaty of Peace was signed at Versailles on June 28, 1919, but it did not come into force until January 10, 1920. In the meanwhile—namely, on July 31, 1919—the Treaty of Peace Act, 1919, received the Royal Assent, and became part of the statute law of this country. That Act provides (by s. 1, sub-s. 1) that His Majesty may (amongst other things) make such Orders in Council as appear to him necessary for carrying out the said Treaty, and for giving effect to any of its provisions; and (by s. 1, sub-s. 2) that any Order in Council made thereunder shall have effect as if enacted by that Act. The effect of that is that any such Order in Council operates as a statutory enactment. On August 18, 1919, the Treaty of Peace Order, 1919 (hereinafter referred to as the Order in Council), was made under the Treaty of Peace Act, 1919, but it only came into operation on the date when the Treaty of Peace came into force, that is, January 10, 1920.

Before referring to the provisions of the Order, I will turn to the relevant provisions of the Treaty of Peace. The Treaty is divided into fifteen parts. The provisions which I am concerned with are those in Ss. III. and IV. of Part X. Part X. is entitled "Economic Clauses." Sect. III. deals with "Debts" and is composed of Art. 296 and an Annex. Sect. IV. deals with "Property, rights and interests," and is composed of Arts 297 and 298 and an Annex. The material provisions of Art. 296 and the Annex thereto are as follows: "There shall be settled through the intervention of clearing offices to be established by each of the High Contracting Parties within three months of the notification referred to in paragraph (e) hereafter the following classes of pecuniary obligations: (1) Debts payable before the war and due by a national of

one of the Contracting Powers, residing within its territory, to a national of an Opposing Power, residing within its territory." That is the clause within which the pecuniary obligation I am concerned with here falls. "(4) . . . The proceeds of liquidation of enemy property, rights, and interests mentioned in Section IV. and in the Annex thereto will be accounted for through the clearing offices, in the currency and at the rate of exchange hereinafter provided in paragraph (d), and disposed of by them under the conditions provided by the said Section and Annex. The settlements provided for in this Article shall be effected according to the following principles and in accordance with the Annex to this Section." Then comes para. (a), which is as follows: "Each of the High Contracting Parties shall prohibit, as from coming into force of the present Treaty, both the payment and the acceptance of payment of such debts, and also all communications between the interested parties with regard to the settlement of the said debts otherwise than through the clearing offices; (b) Each of the High Contracting Parties shall be respectively responsible for the payment of such debts due by its nationals, except in the cases where before the war the debtor was in a state of bankruptcy or failure, or had given formal indication of insolvency or where the debt was due by a company whose business has been liquidated under emergency legislation during the war. Nevertheless, debts due by the inhabitants of territory invaded or occupied by the enemy before the Armistice will not be guaranteed by the States of which those territories form part; (c) The sums due to the nationals of one of the High Contracting Parties by the nationals of an Opposing State will be debited to the clearing office of the country of the debtor, and paid to the creditor by the clearing office of the country of the creditor; (d) Debts shall be paid or credited in the currency of such one of the Allied and Associated Powers, their colonies or protectorates, or the British Dominions or India, as may be concerned. If the debts are payable in some other currency they shall be paid or credited in the currency of the country concerned, whether an Allied or Associated Power, Colony, Protectorate, British Dominion

RUSSELL
J.

1920

NIERHAUS,
In re.

RUSSELL or India, at the pre-war rate of exchange." Then the next
J. paragraph I will read is (e) "The provisions of this Article
1920 and the Annex hereto shall not apply as between Germany
NIERHAUS, on the one hand and any one of the Allied and Associated
In re. Powers, their colonies or protectorates, or any one of the
British Dominions or India on the other hand, unless within
a period of one month from the deposit of the ratifications of
the present Treaty by the Power in question, or of the ratifica-
tion on behalf of such Dominion or of India, notice to that
effect is given to Germany by the Government of such Allied
or Associated Power or of such Dominion or of India as the
case may be." The giving of the notice there referred to has
not been proved before me, but I am told it has in fact been
given, and I am acting, of course, upon that assumption.
Then comes the Annex to Art. 296. Para. 2 of that is
material: "In this Annex the pecuniary obligations referred
to in the first paragraph of Article 296 are described as
'enemy debts,' the persons from whom the same are due as
'enemy debtors,' the persons to whom they are due as 'enemy
creditors,' the clearing office in the country of the creditor
is called the 'creditor clearing office,' and the clearing office
in the country of the debtor is called the 'debtor clearing
office.'" Then para. 3 is: "The High Contracting Parties
will subject contraventions of paragraph (a) of Article 296
to the same penalties as are at present provided by their
legislation for trading with the enemy. They will similarly
prohibit within their territory all legal process relating to
payment of enemy debts, except in accordance with the
provisions of this Annex." Then para. 5 says: "Creditors
shall give notice to the creditor clearing office within six
months of its establishment of debts due to them, and shall
furnish the clearing office with any documents and informa-
tion required of them. The High Contracting Parties will
take all suitable measures to trace and punish collusion between
enemy creditors and debtors. The clearing offices will com-
municate with one another any evidence and information
which might help the discovery and punishment of such
collusion. The High Contracting Parties will facilitate as

much as possible postal and telegraphic communication at the expense of the parties concerned and through the intervention of the clearing offices between debtors and creditors desirous of coming to an agreement as to the amount of their debt. The creditor clearing office will notify the debtor clearing office of all debts declared to it. The debtor clearing office will, in due course, inform the creditor clearing office which debts are admitted and which debts are contested. In the latter case, the debtor clearing office will give the grounds for the non-admission of debt." Then para. 11 provides for a balance between the clearing offices to be struck monthly and the credit balance paid in cash by the debtor State within a week. I think the only other material provision is para. 25 of the Annex: "In any case where a creditor clearing office declines to notify a claim to the debtor clearing office, or to take any step provided for in this Annex, intended to make effective in whole or in part a request of which it has received due notice, the enemy creditor shall be entitled to receive from the clearing office a certificate setting out the amount of the claim, and shall then be entitled to prosecute the claim before the Courts or to take such other proceedings as may be open to him."

Upon the assumption that the necessary notice has been given to Germany, the effect of Art. 296 and the Annex as regards a pre-war debt by a German national to a British national appears to me to be that this country and Germany have as matter of contract agreed, first, that such a debt shall be settled only through the clearing offices, secondly, that each country shall prohibit both the payment and the acceptance of payment of such debt otherwise than through the clearing offices, and, thirdly, that each country will prohibit within their territory all legal process relating to such debt except in certain defined circumstances. This contract on the part of this country is placed upon a statutory basis by the Order in Council. Sect. 1 of that Order provides that certain Sections of the Treaty of Peace, including S. III. and its Annex, shall have full force and effect as law, and that for the purpose of carrying out the said Sections certain enumerated

RUSSELL
J.

1920

NIERHAUS,
In re.

RUSSELL
J.

1920

NIERHAUS,
In re.

provisions shall have effect. By virtue of the Treaty of Peace Act these provisions also have effect as if enacted by statute. The provisions include the following : Sect. 1, sub-s.1, says : " There shall be established in the United Kingdom a clearing office under the control and management of such person (hereinafter referred to as the controller) as the Board of Trade may appoint for the purpose, and there shall be attached thereto such officers and servants as the Board of Trade, subject to the consent of the Treasury as to number, may determine, and there shall be paid to the controller and to such officers and servants such salaries or other remuneration as the Treasury may determine." Sub-s. 2 says : " It shall not be lawful for any person to pay or accept payment of any enemy debt except in cases where recovery thereof in a court of law is allowed as hereinafter provided, otherwise than through the clearing office, and no person interested in any such debt as debtor or creditor shall have any communication with any other person interested therein as creditor or debtor except through or by leave of the clearing office, and if any person contravenes this provision he shall be guilty of an offence and liable to be proceeded against and punished as if he had been guilty of the offence of trading with the enemy, and s. 1 of the Trading with the Enemy Act, 1914, shall apply accordingly." Then sub-s. 3 says : " It shall not be lawful for any person to take proceedings in any court for the recovery of any enemy debt except in the circumstances provided under paragraphs 16, 23 and 25 of the Annex to the said Section III." By s. 2 of the Order the expression " enemy debt " has the meaning assigned to it by para. 2 of the Annex to S. III. of Part X. of the Treaty, and includes any sum which under the Treaty is to be treated or dealt with in like manner as an enemy debt. If the matter rested there the result would be quite plain. By virtue of s. 1, sub-s. 2, of the Treaty of Peace Act, 1919, there would be read into that Act provisions making it (with exceptions immaterial for our purpose) unlawful for any person to pay, or accept payment of, any enemy debt otherwise than through the clearing office, or to take proceedings in any Court for the

recovery of such debt. This statutory enactment would, in my opinion, repeal and take away the power conferred upon this Court by s. 5, sub-s. 2, of the Act of 1914 to authorize the payment by the custodian of the whole or any part of a debt due by a German national.

RUSSELL
J.
1920
NIERHAUS,
In re.

But the matter does not rest there. It is alleged by the applicants that by virtue of Art. 297 of the Treaty of Peace and the Annex thereto the powers of this Court under s. 5, sub-s. 2, of the Act of 1914 survive. The material provisions of Art. 297 and the Annex thereto are as follows: "The question of private property, rights and interests in an enemy country shall be settled according to the principles laid down in this section and to the provisions of the Annex hereto." Then comes para. (a), which applies only to Germany: "The exceptional war measures and measures of transfer (defined in paragraph 3 of the Annex hereto) taken by Germany with respect to the property, rights and interests of nationals of Allied or Associated Powers, including companies and associations in which they are interested, when liquidation has not been completed, shall be immediately discontinued or stayed and the property, rights and interests concerned restored to their owners, who shall enjoy full rights therein in accordance with the provisions of Article 298." Then (b) is: "Subject to any contrary stipulations which may be provided for in the present Treaty, the Allied and Associated Powers reserve the right to retain and liquidate all property, rights and interests belonging at the date of the coming into force of the present Treaty to German nationals, or companies controlled by them, within their territories, colonies, possessions and protectorates, including territories ceded to them by the present Treaty." Then para. (d) says: "As between the Allied and Associated Powers or their nationals on the one hand and Germany or her nationals on the other hand, all the exceptional war measures, or measures of transfer, or acts done or to be done in execution of such measures as defined in paragraphs 1 and 3 of the Annex hereto shall be considered as final and binding upon all persons except as regards the reservations laid down in the present Treaty." Then the

RUSSELL
J.
1920
NIERHAUS,
In re.

material provisions of the Annex to Art. 297 are first of all para. 1 : "In accordance with the provisions of Article 297, paragraph (d), the validity of vesting orders and of orders for the winding up of businesses or companies, and of any other orders, directions, decisions or instructions of any court or any department of the Government of any of the High Contracting Parties made or given, or purporting to be made or given, in pursuance of war legislation with regard to enemy property, rights and interests is confirmed. The interests of all persons shall be regarded as having been effectively dealt with by any order, direction, decision or instruction dealing with property in which they may be interested, whether or not such interests are specifically mentioned in the order, direction, decision, or instruction. No question shall be raised as to the regularity of a transfer of any property, rights or interests dealt with in pursuance of any such order, direction, decision or instruction. Every action taken with regard to any property, business, or company, whether as regards its investigation, sequestration, compulsory administration, use, requisition, supervision, or winding up, the sale or management of property, rights or interests, the collection or discharge of debts, the payment of costs, charges, or expenses, or any other matter whatsoever, in pursuance of orders, directions, decisions, or instructions of any court or of any department of the Government of any of the High Contracting Parties, made or given, or purporting to be made or given, in pursuance of war legislation with regard to enemy property, rights or interests, is confirmed." Then there is a provision which I need not trouble to read. Then para. 3 says : " In Article 297 and this Annex the expression ' exceptional war measures ' includes measures of all kinds, legislative, administrative, judicial, or others, that have been taken or will be taken hereafter with regard to enemy property, and which have had or will have the effect of removing from the proprietors the power of disposition over their property, though without affecting the ownership, such as measures of supervision, of compulsory administration, and of sequestration ; or measures which have had or will have as an object

the seizure of, the use of, or the interference with enemy assets, for whatsoever motive, under whatsoever form, or in whatsoever place. Acts in the execution of these measures include all detentions, instructions, orders, or decrees of Government departments or courts applying these measures to enemy property, as well as acts performed by any person connected with the administration or the supervision of enemy property, such as the payment of debts, the collecting of credits, the payment of any costs, charges or expenses, or the collecting of fees. Measures of transfer are those which have affected or will affect the ownership of enemy property by transferring it in whole or in part to a person other than the enemy owner, and without his consent, such as measures directing the sale, liquidation, or devolution of ownership in enemy property, or the cancelling of titles or securities.”

RUSSELL
J.
1920
NIEBHAUS,
In re.

Article 297 and the Annex thereto are also within s. 1 of the Order in Council, and must equally with Art. 296 and the Annex thereto be read into and treated as enacted by the Treaty of Peace Act, 1919. It is said that para. (d) of Art. 297 and para. 3 of the Annex show that the effect of the Treaty is not only to confirm up to date the exercise by this Court of its powers of administration under war legislation, but to continue those powers and make them effective as regards the Court's future administrative acts and orders. There is one general observation to be made in reference to this argument. It is based on general words dealing with general subject matters. On the other hand, the provisions as regards debts in the Treaty of Peace and in the Order in Council are quite specific, and deal only with a specific subject matter. If there be any conflict between the two the specific enactment would prevail over the general enactment. Whether there is in fact any conflict must be considered. The argument on behalf of the applicants depends mainly on para. (d) of Art. 297. This provides that all the exceptional war measures, or measures of transfer, or acts done or to be done in exercise of such measures as defined in paras. 1 and 3 of the Annex shall be considered as final and binding. Para. 1 of the Annex in terms only relates to and confirms orders,

RUSSELL
J.
1920
NIERHAUS,
In re.
—

directions and other actions already made, given or taken. It does not relate to the future. Para. 3 of the Annex is a definition section, and by it the phrase "exceptional war measures" in para. (d) of Art. 297 includes measures of all kinds, legislative, administrative, judicial or others, (1.) which have been taken or will be taken thereafter with regard to enemy property, and which have had or will have the effect of removing from the proprietors the power of disposition over their property; (2.) which have had or will have as an object the seizure of, the use of, or the interference with enemy assets, for whatsoever motive, under whatsoever form or in whatsoever place. Further, by para. 3 of the Annex, the phrase "acts done or to be done" in execution of such measures, in para. (d) of Art. 297, includes "acts performed by any person connected with the administration or the supervision of enemy property, such as the payment of debts." Accordingly, to the extent to which para. (d) of Art. 297 applies as between this country and Germany, both past and present acts, done or to be done, in the execution of "exceptional war measures" by any person connected with the administration of enemy property are made final and binding. The question then resolves itself into this. Does para. (d) of Art. 297 apply so as to authorize future orders in regard to payment of debts due from German nationals to British nationals, this country and Germany having adopted Art. 296 and the Annex thereto? In my opinion it does not. Para. (d) of Art. 297 by its terms does not apply as regards the reservations laid down in the present Treaty, that is to say, as regards any reservations contained in the Treaty and not merely those in Art. 297 itself. One of the reservations in the Treaty appears to me to be that, when one of the Allied and Associated Powers has by its Government given to Germany the notice specified in para. (e) of Art. 296, pre-war debts due by German nationals to nationals of the Power giving the notice can only be paid through the clearing offices. Payment in any other manner or by any other means is prohibited, and this prohibition (contractual by the Treaty) has now as regards this country become, by virtue of the Treaty of Peace Act, 1919,

and the Order in Council a statutory prohibition. This view leaves Art. 297 and the Annex thereto in full operation as between Germany and Powers not adopting S. III. and the Annex thereto; and, as between Germany and Powers adopting S. III. and the Annex thereto, it leaves ample scope for the operation of Art. 297 and the Annex thereto, in respect of matters not covered by Art. 296 and the Annex thereto. There is not, in my opinion, any conflict between the two sets of provisions. Accordingly in my judgment, this country having adopted S. III. and the Annex thereto, the payment under s. 5, sub-s. 2, of the Act of 1914 of pre-war debts due by German nationals to British nationals could not be justified under the provisions of Art. 297 and the Annex thereto; the payment of such debts rests solely on and can only be made under the provisions of Art. 296 and the Annex thereto.

In the result I hold that the power conferred by sub-s. 2 of s. 5 of the Act of 1914 has (so far as concerns pre-war debts due by German nationals to British nationals) come to an end, and that I cannot make the order asked for.

I desire to add something further. The Attorney-General in his argument urged that, even if the power of the Court under s. 5, sub-s. 2, of the Act of 1914 survived, it was nevertheless a purely discretionary power. He said that, from the administrative point of view, it would be most undesirable that there should be two different means of obtaining payment of debts, with possibly different rates of exchange and rates of interest, and he asked that, in the event of my deciding that the power of the Court still existed, I should decline to exercise my jurisdiction. The need to consider this does not now arise, but I may say that I fully appreciate the administrative inconveniences which would arise, and I should hesitate long before refusing to accede to the Attorney-General's request.

Solicitors : *Busk, Mellor & Norris, for Slater, Heelis & Co., Manchester ; Coward & Hawksley, Sons & Chance.*

A. L.

RUSSELL
J.
1920
NIEERHAUS,
In re.

RUSSELL
J.

In re NATIONAL BANK FÜR DEUTSCHLAND.

1920
July 26.

In re ANGLO-AUSTRIAN BANK (LONDON AGENCY).

[1920. N. 230.]

War—Emergency Legislation—Winding Up of Enemy Business—Debt due from German National—Recovery—Jurisdiction of Court—Discretion—Trading with the Enemy Amendment Act, 1914 (5 Geo. 5, c. 12), s. 5, sub-ss. 1, 2—Treaty of Peace with Germany, Part X., Ss. III., IV., arts, 296, 297.

The business of the London agency of an Austrian bank was being wound up by a controller pursuant to an order under s. 1 of the Trading with the Enemy Amendment Act, 1916. The Agency was owed a debt by a German bank, property belonging to which or in which that bank was interested had been vested in the custodian by orders under the Trading with the Enemy Acts. Upon an application by the controller for direction to be given, under s. 5, sub-s. 1 or sub-s. 2, of the Trading with the Enemy Amendment Act, 1914, to the custodian to pay the debt:—

Held, that the power of the Court under either sub-section—if its jurisdiction continued after the Treaty of Peace with Germany came into force, as to which, *quaere*—was discretionary and ought not to be exercised in the circumstances.

SUMMONS by the controller appointed by the Board of Trade under s. 1 of the Trading with the Enemy Amendment Act, 1916, to wind up the business carried on in the United Kingdom of the Anglo-Austrian Bank (London Agency). It raised the question whether, notwithstanding the Treaty of Peace between this country and Germany, which came into force on January 10, 1920, directions should (or could) be given by the Court, under either sub-s. 1 or sub-s. 2 of the Trading with the Enemy Amendment Act, 1914 (1), to the

(1) Trading with the Enemy Amendment Act, 1914, s. 5, sub-s. 1: "The custodian shall, except so far as the Board of Trade or the High Court or a judge thereof may otherwise direct, and subject to the provisions of the next succeeding sub-section, hold any money paid to and any property vested in him under this Act until the termination

of the present war, and shall thereafter deal with the same in such manner as His Majesty may by Order in Council direct."

Sub-s. 2: "The property held by the custodian under this Act shall not be liable to be attached or otherwise taken in execution, but the custodian may, if so authorised by an order of the

Public Trustee to pay to the applicant a debt due from the National Bank für Deutschland, a German bank, to the Anglo-Austrian Bank (London Agency) out of property vested, under orders of the Court, in the Public Trustee as custodian in respect of the German bank.

RUSSELL
J.
1920
NATIONAL
BANK
FÜR
DEUTSCH-
LAND,
In re.
ANGLO-
AUSTRIAN
BANK,
In re.

Maugham K.C. and *F. K. Archer* for the controller. This is a test case affecting the claims of the London Agencies of German and Austrian banks against assets in the hands of the custodian. In a sense these London Agencies are British nationals, who have to apply for payment of debts due to them through the clearing office: Treaty of Peace with Germany, art. 296, paras. 1, 2; *In re Nierhaus*. (1) "Nationals" is the English translation sometimes of the French "ressortissants," sometimes of "nationaux," art. 276, para. (d). British subjects, to have a right to claim through the clearing office, must be nationals residing in this country. The controller cannot claim that these agencies have a right to be paid through the clearing office. Their claim is not different from that of any other non-British national.

The Peace Treaty contemplates that legislative war measures shall be carried out to their logical conclusion—to the bitter end (art. 297). A British national who has been paid part of his debt in a liquidation or a winding up can apply for the balance through the clearing office (*Ibid.* Annex, para. 4). That presupposes that proceedings by liquidation and winding up are to continue. It is a complete mistake to suppose that when the Peace Treaty came into effect emergency legislation was to cease to operate (art. 297, paras. (a), (b), (d), (h)). The validity of orders, past, present or future, is confirmed (*Ibid.* Annex, paras. 1, 3, 4). The Treaty

High Court or a judge thereof"—as amended by the Trading with the Enemy Amendment Act, 1916, s. 12—"pay out of the property paid to him in respect of that enemy," i.e., an enemy any property belonging to whom was vested in the custodian, "the whole or any

part of any debts due by that enemy and specified in the order: provided that . . . the custodian shall take into consideration the sufficiency of the property . . . to satisfy that debt and any other claims. . . ."

(1) *Ante*, p. 269.

RUSSELL
J.
1920
NATIONAL
BANK
FÜR
DEUTSCH-
LAND,
In re.
ANGLO-
AUSTRIAN
BANK,
In re.

proceeds on the footing that all war legislation as to vesting of property and as to winding up will be continued. Legislative measures in the past, and acts in the future in pursuance of those measures, are both contemplated as included in para. 9 of the Annex to art. 297. This country is apparently empowered by the Treaty to carry out the emergency legislation. The Court can, therefore, under either sub-s. 1 or sub-s. 2 of s. 5 of the Trading with the Enemy Amendment Act, 1914, direct the custodian to pay this debt.

Sir Gordon Hewart A.-G. and *Austen-Cartmell* for the custodian. This is really a question of discretion for the Court. Sub-s. 1 of s. 5 provides that, subject to two exceptions, the custodian shall hold the property vested in him until the termination of the present war. That termination has not yet come: Termination of the War (Definition) Act, 1918, s. 1, sub-s. 1; the Order in Council has not yet been made. The custodian has to hold the property till (1.) the order declaring the termination of the war is made, and (2.) an order is made directing him how to deal with the property. The custodian asks the Court to wait for the orders to be made and not prejudice the rights of British nationals by acceding—assuming it has jurisdiction—to the controller's application. In any case, the power under sub-s. 1 and sub-s. 2 is discretionary. The controller is in this dilemma: if the London Agency of an enemy bank is a British national, he must apply through the clearing office: *In re Nierhaus* (1); if it is not, innumerable difficulties arise, e.g., if the case comes within sub-s. 2, the custodian must retain enough to pay and satisfy other debts and claims, and, further, if the debt were paid, a non-British national would be getting an advantage over British nationals. Younger J. was never tired of saying that the object of the Trading with the Enemy Amendment Act, 1914, was not the benefit of creditors but the creation of a central fund to be dealt with at the conclusion of peace. The Government's guarantee of British nationals being paid is under para. (c) of art. 296 and not under para. (b). Vesting orders are not war measures which are still in

(1) *Ante*, p. 269.

operation (art. 297), but are methods of transfer which are confirmed (Ibid. Annex, para. 1).

Sheldon for the controller of the clearing office. The claim that the London Agency is a British national being abandoned, there cannot at present be any claim upon the clearing office.

Archer in reply.

RUSSELL J. This is a summons taken out by the controller appointed for the purpose of winding up the business carried on in the United Kingdom by an Austrian Bank called the Anglo-Austrian Bank of Vienna. It is intituled in the matter of the London Agency of that bank and it is also intituled in the matter of the National Bank für Deutschland. The respondents to the summons are the Board of Trade, the Public Trustee as custodian under the Trading with the Enemy Acts, and the controller of the clearing office established under the Treaty of Peace Order, 1919. The matters to which the summons relates are the following. In the course of winding up the business of the London Agency of the Anglo-Austrian Bank it transpired that there was a debt due to that Agency from a German bank, the National Bank für Deutschland. As regards the German bank, there have been various orders made under the Trading with the Enemy Acts, vesting divers items of property, formerly belonging to that bank or in which that bank was interested, in the Public Trustee as custodian, and by one of the orders an inquiry was directed as to the debts due from the German bank to persons within the United Kingdom not being enemies within the meaning of the Trading with the Enemy Acts. Ultimately by a later order of July 2, 1917, Younger J. thought it was not expedient to proceed with that inquiry and it has never been completed. Now the question arises whether directions should be given by the Court to the custodian to pay to the Anglo-Austrian Bank the amount of the debt due from the German bank to the London Agency of the Anglo-Austrian Bank. The exact amount of the debt is not ascertained, but it is admitted that

RUSSELL
J.

1920
NATIONAL
BANK
FÜR
DEUTSCH-
LAND,
In re.

ANGLO-
AUSTRIAN
BANK,
In re.

RUSSELL
J.

1920

NATIONAL
BANK
FÜR
DEUTSCH-
LAND,
In re.

ANGLO-
AUSTRIAN
BANK,
In re.

something is due from the German bank to the Anglo-Austrian Bank.

The power of the Court to do that would arise under s. 5 of the Trading with the Enemy Amendment Act, 1914, either under sub-s. 1 or sub-s. 2. Sub-s. 1 is in these terms: [His Lordship read the sub-section.] The first event there mentioned has not happened, that is to say, there has not yet been any termination of the present war, and accordingly it follows that there has not yet been made the Order in Council which is referred to. Sub-s. 2 provides: [His Lordship read the sub-section to "specified in the order."] I have already decided in *In re Nierhaus* (1) that, as regards sub-s. 2 of s. 5, by reason of the Peace Treaty between this country and Germany, the power of the Court to authorize the payment of a debt due to a British national out of German property paid to the custodian in respect of a German enemy has come to an end. But it is said that *In re Nierhaus* (1) does not apply here because the Anglo-Austrian bank is not a British national. It is further said that, even if that contention is wrong and the power under sub-s. 2 has come to an end as regards persons who are not British nationals, yet the power under sub-s. 1 still survives. Now in either case, whether under sub-s. 1 or under sub-s. 2, the power is completely discretionary. It is a discretionary power and nothing else. Under sub-s. 1 it is a power in the Court or the Board of Trade to direct the custodian to apply the property in a particular manner. Under sub-s. 2 it is a power in the Court to authorize the custodian to pay debts, and the custodian having obtained that authority may or may not pay the debts according as he sees fit.

That being so, it being from either point of view, under either sub-section, a purely discretionary power, I turn now to consider quite shortly and briefly the provisions of the Peace Treaty between this country and Germany. The argument advanced on behalf of the applicant was this, that the Peace Treaty, putting it at its lowest, contemplates the continuation, after the Peace Treaty has come into operation, of proceedings for the

(1) Ante, p. 269.

liquidation of property belonging at the date of the Treaty to German nationals—that it contemplates the continuation of liquidation proceedings which have taken place and are taking place under emergency legislation. I think it is true to say that in certain circumstances the Peace Treaty does contemplate that such liquidation proceedings may continue notwithstanding the Treaty, but the present is not, in my view, the case of a liquidation within the meaning of those words. This is a case merely of property vested under a vesting order. There is no liquidation of the business of the Deutschland bank at all in this country. It is a case merely of property formerly belonging to the Deutschland bank which has become vested in the custodian under a vesting order. That seems to me a different matter altogether. But, putting it at its highest, it is this : that if it be a liquidation the Treaty does contemplate that such proceedings may continue. But it leaves unaffected the point that the power which I am asked to exercise is a discretionary power. I ask myself this. Ought I in the circumstances of the present case to exercise the discretion I have (assuming I have it), by directing or authorizing the custodian to pay this particular debt due from a German national to this London Agency of the Anglo-Austrian Bank ? It seems to me I ought not. To do so might give rise to various difficulties. It certainly would give rise to this very extraordinary position, that, whereas the Treaty contemplates that British nationals should be paid as far as possible their debts out of what has sometimes been referred to as the central fund, the clearing office fund, and whereas it is quite obvious that the clearing office fund may ultimately be entitled to have transferred to it the property which is at present vested in the custodian, if I were to exercise my discretion by making the order the direct result would be that I should be diminishing the fund which may hereafter be available for the payment of debts due to British nationals, and I should be increasing the potential liability hereafter of this country to supplement in favour of British nationals any possible deficiency of that fund. I am asked to do that, not in favour of British nationals but of persons not British

RUSSELL
J.

1920

NATIONAL
BANK
FÜR
DEUTSCH-
LAND,
In re.

ANGLO-
AUSTRIAN
BANK,
In re.

RUSSELL
J.
1920
NATIONAL
BANK
FÜR
DEUTSCH-
LAND,
In re.
ANGLO-
AUSTRIAN
BANK,
In re.
—

nationals. In the exercise of my discretion I think I should be wrong in giving any such direction or authority to the custodian. I think, as the Attorney-General suggested, the true and proper course for the Court to adopt is to let the matter rest as it is, giving no directions at all. Let the matter rest and let us await the making of the Order in Council which is referred to in sub-s. 1 and then the custodian can still deal with the property in accordance with the provisions of that Order in Council. I do not know what that Order in Council will contain. It may be it will contain provisions to deal with such matters as this. It might not. At all events I think it would be premature and unwise to take any steps now or give any directions which would have the effect of diminishing unnecessarily the fund with which the Order in Council may deal.

The case has been brought before me as a test case. I wish to limit myself in this regard, that it is conceivable that some very special case might arise in which upon a subsequent application to the Court for the exercise of its discretion, in the circumstances of that very special case it might be necessary for the Court then to consider even more fully the arguments which have been brought before it to-day, but until that case arises I do not propose to give anything in the nature of a direction which would be applicable as a general rule. I do not want to fetter the hands of the Court and close the door absolutely against any case which might be one of very great hardship. This is a test case qua the London Agencies of the Austrian and German banks—I am told there are four banks and four controllers—the order can be prefaced by saying “the Court being of opinion that the custodian should not accede to any application by the controller of the Anglo-Austrian Bank (London Agency) for the payment out of the property vested in the custodian under the above-mentioned Acts of any debt due to the Anglo-Austrian Bank (London Agency) by any bank being an enemy or former enemy, and that the Anglo-Austrian Bank (London Agency) is not a British national for the

purposes of Section III. of the Treaty of Peace (set out in the schedule to the Treaty of Peace Order, 1919) or of making any claim thereunder through the Clearing Office established under that Order."

Solicitors: *Peter Thomas & Clark; Coward & Hawksley, Sons & Chance; Solicitor to Board of Trade; Gilbert Samuel & Co.*

A. L.

RUSSELL
J.
1920
NATIONAL
BANK
FÜR
DEUTSCH-
LAND,
In re.
ANGLO-
AUSTRIAN
BANK,
In re.

COOPE v. RIDOUT.

[1920. C. 139.]

C. A.
1920
Nov. 12, 15.

Specific Performance—Conditional Offer—"Subject to title and contract"—Agreed Terms embodied in Draft Contract—Approval by Vendor—Absence of formal written Agreement inter partes—No enforceable Contract.

Purchasers made an offer by letter to a vendor to purchase his freehold property at a specified sum "subject to title and contract." Negotiations followed, and the purchasers alleged that all the material terms were subsequently agreed to between the parties at an interview and by letters, and were embodied by the purchasers in a draft contract which the vendor returned unaltered with the words: "It seems to be all in order." The vendor having refused to complete, the purchasers brought an action for specific performance of the contract contained in the draft:—

Held, that even assuming that all the terms of the agreement had been settled one by one and embodied in the draft, the condition contained in the offer required that a written agreement made inter partes should be formally entered into, and in the absence of such a document there was no enforceable contract.

Winn v. Bull (1877) 7 Ch. D. 29, 32, and *Von Hatzfeldt-Wildenburg v. Alexander* [1912] 1 Ch. 284, 288 applied.

Decision of Eve J. [1920] 2 Ch. 411 affirmed.

APPEAL from a decision of Eve J. (1)

The defendant, Charles E. Ridout, was entitled in fee simple to a dwelling house, land, and premises at Lyndhurst, in the county of Hants, known as the Park Hill Estate. The plaintiffs, Edward Jesser Coope and Edward Thomas Mashiter, were the trustees of the marriage settlement of Mrs. Gertrude Fulcher who was, in the month of August, 1919, in occupation

(1) [1920] 2 Ch. 411.

C. A.
1920
COOFE
v.
RIDOUT.

of the said premises as tenant thereof under a lease expiring on February 2, 1920, at a rental of 450*l.* a year.

In August, 1919, Mrs. Fulcher requested the plaintiffs to purchase the freehold of the said premises out of moneys in her settlement available for that purpose, and on August 16, 1919, Messrs. Fellowes & Co., the plaintiffs' solicitors, wrote to the defendant a letter saying that they understood that he was willing to sell the freehold of this property and concluding as follows: "We are instructed on behalf of clients of ours to make an offer of 12,000*l.* for the property, subject to title and contract. Completion to be on September 29 next. As the time is somewhat short we should be glad to hear from you with the least loss of time possible whether the offer we make is acceptable; it represents 27 years' purchase on the rental value." This was replied to by the defendant on September 2, 1919, to the effect that he might possibly be prepared to accept the offer for his property though he had given a good deal more than 12,000*l.* for the place.

On September 5, 1919, there was an interview between Mr. E. N. Fellowes as the plaintiffs' agent and the defendant at which the parties, as the plaintiffs alleged, agreed verbally to the price of 12,000*l.* for the Park Hill Estate, subject to an arrangement being come to as to the removal by the defendant of certain furniture, and to the purchasers taking over certain fixtures at a valuation; and the date for completion was altered to February 2, 1920. By subsequent correspondence arrangements were come to on the two questions of the disposal of the furniture and the purchase of the fixtures at a valuation. In one of these letters dated October 16, 1919, written by Mr. E. N. Fellowes to the defendant, he said: "I think a formal contract for sale should be drawn up and signed by yourself and my clients and completion to be fixed for February 2 at the termination of the lease." On November 5, 1919, the defendant wrote to Mr. Fellowes apologizing for his delay in answering his letter and saying: "The fact is I was hoping to have something definite arranged about our furniture, but I quite understand your wish to have some form of agreement drawn up." After

further correspondence Mr. E. N. Fellowes embodied all the agreed terms which had been come to between the parties in a draft contract, and on November 19, 1919, he wrote to the defendant saying: "I enclose herewith the draft of a contract which I have prepared . . . and I should be glad if you will look through it and return it to us with any comments and additions you may think advisable. As I do not know the title to the property I have, as you will see, provided that the title to be deduced shall be the same as that deduced to the present mortgagees of the property." On December 2, 1919, the defendant replied returning the draft, and saying: "It seems to be all in order." No question as to the price was raised in any letter by the defendant. Meanwhile Sir Stephen Leech had been permitted to view the property and offered the defendant 13,000*l.* for it.

On December 11, 1919, the defendant wrote to Mr. Fellowes stating this fact and saying that he had told Sir S. Leech that he was doubtful whether he was still in a position to sell it to him as matters had gone some way, though not completed. He added: "Is it too late to ask if your clients would give me 13,000*l.* instead of 12,000*l.* or release me?" It appeared from another letter that there was a mortgage on the property for 12,000*l.* and that the defendant had originally given 16,000*l.* for the property. The plaintiffs having refused to increase the price, or to release the defendant, the latter, through his solicitors, declined to carry out the sale or execute the engrossment sent to him. The plaintiffs then commenced their action on January 15, 1920, and claimed specific performance of the agreement to sell them the Park Hill Estate and damages. The defence was a denial of any binding and concluded agreement until engrossments had been executed by both parties.

Eve J. held that the condition contained in the offer required that a written contract made inter partes should be formally entered into, and in the absence of such document there was no enforceable contract.

The plaintiffs appealed. The appeal was heard on November 12, 15, 1920.

C. A.
1920
COOPE
v.
RIDOUT.
—

C. A.
1920
COOPE
v.
RIDOUT.

Owen Thompson K.C. and *Bryan Farrer* for the appellants.
There was in this case a concluded agreement. Every term agreed upon was embodied in the draft contract which was returned by the defendant unaltered and approved. The words "subject to contract" may mean "subject to the terms being formally embodied in an engrossment and executed by the parties" or they may mean that the terms are to be set out in proper form : *Winn v. Bull*. (1)

This case also differs from *Rossdale v. Denny*. (2)

It is not proposed to argue that if an offer or acceptance is made subject to a formal contract a formal contract is not necessary. Where a condition is imported into an offer it must be fulfilled in order that there should be a binding contract. That however is not this case. In *Rossiter v. Miller* (3) Lord Blackburn says : "As soon as the fact is established of the final mutual assent of the parties so that those who draw up the formal agreement have not the power to vary the terms already settled, I think the contract is completed."

[WARRINGTON L.J. Lord Blackburn was not there dealing with an offer subject to a contract.]

There is no reported case in which where all the terms have been agreed to it has been held that there was no contract. It is submitted that "subject to contract" in the letter of August 16, 1919, means subject to the parties arriving at a consensus as to all the terms necessary to a binding contract for the sale of real estate. The purchasers desire not to be bound unless the vendor is equally bound. The letter of August 16 was a complete offer subject to a condition.

For the purposes of the present argument it is not necessary to say that the decision of Parker J. in *Von Hatzfeldt-Wildenburg v. Alexander* (4) was wrong. If the condition in the appellants' offer means that the contract was to be approved it was sufficiently fulfilled when a consensus

(1) 7 Ch. D. 29.

(3) (1878) 3 App. Cas. 1124, 1151.

(2) [1920] W. N. 335; since reported ante, p. 57.

(4) [1912] 1 Ch. 284, 288.

was come to by the parties on all the material terms. To say that it means the execution of a formal contract is a further jump. Whether *Von Hatzfeldt-Wildenburg v. Alexander* (1) was rightly decided or not the present case is a simpler one.

C. A.
1920
COOPE
v.
RIDOUT.

[WARRINGTON L.J. The words here are even less favourable to you than those in that case.]

Here in the draft contract the rights of the parties have been adjusted. The contemplated further agreement has been entered into. It is admitted that a plaintiff cannot get specific performance of an agreement to enter into an agreement. The agreement on which the appellants are suing is the agreement embodied in the draft. The case is not within the line of authorities where the words were "subject to the execution of a formal contract" and it is submitted that the Court ought not to read those words into the offer of August 16, 1919.

Maugham K.C. and *A. Adams* for the respondent were not called upon.

LORD STERNDALÉ M.R. This is an appeal from a decision of Eve J. raising the question whether there was a concluded contract between the parties for the sale and purchase of a freehold house and land known as the Park Hill Estate in the New Forest. [His Lordship stated the facts and continued:] The question is whether there was a concluded contract or whether the correspondence taken as a whole showed that the parties were not to be bound until they had executed a formal contract. Looking at the letter of August 16 I think that *prima facie* when a solicitor writes a letter making an offer to purchase "subject to contract" he naturally means "subject to the execution of a formal contract." It is difficult to see what other meaning the letter can have if it does not mean that.

This case, however, in its facts differs from all others that have been referred to, or have come within my own experience. In all the other cases no formal contract had ever been

(1) [1912] 1 Ch. 284.]

C. A.
1920
COOPE
v.
RIDOUT.
—
Lord Sterndale
M.R.
—

prepared in draft, or at any rate no draft of any such a contract had been approved. Here there is a draft approved by the vendor. Does that approved draft satisfy the condition in the letter of August 16, 1919, "subject to contract"? I think the question has been very well answered by Eve J. in the passage in his judgment where he says (1): "That brings me to the question of what is the true meaning of the condition. Is it fulfilled as soon as you can assert with confidence that the parties are ad idem and that a consensus on all material points has been reached? I do not think so. I think the condition contemplates and requires a written contract inter partes and formally entered into. In my opinion, that document has never come into existence in this case, and, in the absence of it, I cannot think I ought to hold that the defendant is bound."

In my opinion the condition requires that a written contract should be formally entered into between the parties. No such contract was ever entered into in the present case. That view is in accordance with the dictum—for it is no more than a dictum—of Parker J. in *Von Hatzfeldt-Wildenburg v. Alexander* (2) that "it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognise a contract to enter into a contract."

In my opinion the appeal fails and must be dismissed.

WARRINGTON L.J. I am of the same opinion. The question is whether the defendant was under a binding contract to sell to the plaintiffs the Park Estate, near Lyndhurst. The offer came originally from the plaintiffs; it was accepted as it was made, and if it was a conditional offer, it remained a conditional bargain upon acceptance. The real question is whether that offer was

(1) [1920] 2 Ch. 411, 419.

(2) [1912] 1 Ch. 284, 289.

subject to a condition, and if so whether that condition has been fulfilled. I think the offer was plainly conditional. After some conversations and correspondence between the parties a draft contract which it was proposed to submit to the vendor was prepared by the purchasers' solicitors and sent by them to the vendor. The vendor returned it saying that "It seems to be all in order." Then what is the true construction of the words "subject to contract" in the plaintiffs' offer of August 16, 1919? I think the offer means that it is an offer to purchase subject to the preparation and execution of a formal contract. If it is attempted to give that offer any other meaning, that meaning must be either "subject to this offer being accepted," which is absurd, or "subject to the parties coming to terms on certain details not yet mentioned." In the latter case it would merely amount to an agreement to enter into a future agreement, which would clearly confer no rights on any of the parties to it.

I think Eve J. was quite right when he said: "I think the condition contemplates and requires a written contract made inter partes and formally entered into. In my opinion that document has never come into existence in this case."

I am quite satisfied that when Jessel M.R. in *Winn v. Bull* (1) referred to a "proposal or agreement made in writing expressed to be subject to a formal contract" as being "subject to and dependent upon a formal contract being prepared" he meant that it was subject also to the execution of such formal contract, and that the mere preparation of a contract would not be sufficient. That, as it seems to me, is in accordance with statement of the law made by Parker J. in *Von Hatzfeldt-Wildenburg v. Alexander*. (2)

I think the decision of Eve J. was right and that this appeal fails.

YOUNGER L.J. I am of the same opinion. The short question in this case is what is the meaning of the words "subject to contract" in Messrs. Fellowes' letter of August 16, 1919. I agree with the Master of the Rolls and

C. A.
1920
COOPE
v.
RIDOUT.
Warrington L.J.

(1) 7 Ch. D. 29, 32.

(2) [1912] 1 Ch. 284, 288.

C. A. the Lord Justice in thinking that those words mean subject
 1920 to the preparation and execution of a formal contract, and
 COOPE that Jessel M.R. in *Winn v. Bull* (1) in referring to the pre-
 v. paration of a formal contract as a compliance with the
 RIDOUT. condition there meant not only its preparation but its execution
 Younger L.J. as well.

Again, I think that Parker J. in dealing with the form of words he found in *Von Hatzfeldt-Wildenburg v. Alexander* (2) treated the approval of a formal document as including its execution.

And, in my judgment, if the matter be considered on principle this must necessarily be the case.

The contract to which reference is made in all these cases is a written agreement to contain provisions additional to those set forth in the proposal. Where the introductory words are conditional in effect the result is that it is only when such an agreement is arrived at that there is any binding bargain reached. And also that when that agreement is arrived at it becomes the bargain and there is no other. The condition is that something not then in existence is to be brought into existence, and when so brought into existence it is to regulate the conventional relation of the parties, superseding by its own force everything in the proposal in which the condition is contained. Accordingly returning now to the letter of proposal here as a matter of words, the expression "subject to contract" must mean either subject to the execution of a contract, or subject to the adjustment of a contract. If, as I think, the expression bears the first meaning, *cadit quaestio*. But if it bears the second, the effect in law, in my view, is the same. For as I have shown this adjusted contract, when it is adjusted, is to be the bargain and the only bargain. The words then on this alternative construction in effect mean "subject to the adjustment of a contract by which when it is adjusted our client will be bound." That is to say it is a condition the fulfilment of which involves an agreement to enter into an agreement which in law is of no force until that agreement becomes

(1) 7 Ch. D. 29, 32.

(2) [1912] 1 Ch. 284, 288.

binding proprio vigore, i.e. by execution. On either view therefore of its meaning the condition for its fulfilment necessitates the execution of the further agreement referred to before its purpose is achieved and until that purpose is achieved there is no agreement at all.

In my judgment there was here no obligation binding on the defendant until after the execution of that agreement: and that has never taken place.

C. A.
1920
COOPE
v.
RIDOUT.
Younger L.J.

Appeal dismissed.

Solicitors for appellants: *Fellowes & Co.*

Solicitors for respondent: *William Sturges & Co.*

W. I. C.

METROPOLITAN WATER BOARD v. BERTON.

PETERSON
J.

[1920. M. 1753.]

1920
July 23.

Land—Compulsory Acquisition for Public Purposes—Acquisition of Land (Assessment of Compensation) Act, 1919 (9 & 10 Geo. 5, c. 57), s. 1, sub-s. 1; s. 12, sub-s. 2—"Public authority"—Definition—"Not trading for profit"—Metropolitan Water Board.

In defining a "public authority" for the purposes of the Acquisition of Land (Assessment of Compensation) Act, 1919, as "any body of persons, not trading for profit, authorised by or under any Act to carry on a railway, canal, dock, water or other public undertaking," s. 12, sub-s. 2, of the Act draws a distinction between a body of persons who carry on an undertaking for private gain with the object of making profits for themselves or distributing profits as dividends, and a body of persons who, although trading, carry on an undertaking for the public benefit.

The Metropolitan Water Board which is authorized by the Metropolis Water Act, 1902, to carry on a water undertaking for the public benefit is a body of persons who, although trading, do not trade for profit, and is, therefore, a "public authority" within the meaning of s. 12, sub-s. 2, of the Act.

MOTION.

The plaintiff Board was established by the Metropolis Water Act, 1902, for the purpose of acquiring by purchase, managing

PETERSON and carrying on the undertakings of the Metropolitan Water Companies therein named, including the Company of the Proprietors of Lambeth Water Works, whose undertaking comprised (inter alia) Rock Hill Reservoir, a covered reservoir near the Crystal Palace, held on lease expiring at Michaelmas, 1936, from the Estate Governors of Alleyn's College of God's Gift at Dulwich (hereinafter called "the Governors") at the annual rent of 30%.

J.
1920
METRO-
POLITAN
WATER
BOARD
v.
BERTON.

By s. 43 of the Metropolitan Water Board Act, 1913 (3 & 4 Geo. 5, c. xcvi.), which Act incorporated the provisions of the Lands Clauses Acts, the plaintiff Board was authorized to purchase and take Rock Hill Reservoir, and on May 8, 1918, the Board served a notice to treat upon the Governors who, on May 9, 1919, delivered their formal claim thereunder, claiming 9240%.

On August 19, 1919, the Acquisition of Land (Assessment of Compensation) Act, 1919, was passed. (1)

On December 2, 1919, the respective surveyors of the plaintiff Board and of the Governors met for the purpose of agreeing, if possible, the amount of compensation, but on their failing to agree, the plaintiff Board's surveyor stated that the matter would have to go before an official arbitrator to be appointed under the last-mentioned Act.

The Governors, in June, 1920, served a notice requesting the plaintiff Board within fourteen days to nominate and

(1) The Acquisition of Land (Assessment of Compensation) Act, 1919 (9 & 10 Geo. 5, c. 57), s. 1, sub-s. 1: "Where by or under any Statute (whether passed before or after the passing of this Act) land is authorised to be acquired compulsorily by any Government Department or any local or public authority, any question of disputed compensation . . . shall be referred to and determined by the arbitration of such one of a panel of official arbitrators to be appointed under this section as may be selected in accordance with rules made by the Reference Committee under this

section."

Sect. 2: "In assessing compensation, an official arbitrator shall act in accordance with the following rules:—

(1.) No allowance shall be made on account of the acquisition being compulsory:

."

Sect. 12, sub-s. 2: "For the purposes of this Act the expression . . . 'public authority' means any body of persons, not trading for profit, authorised by or under any Act to carry on a railway, canal, dock, water or other public undertaking."

appoint an arbitrator, and, subsequently, another notice of the nomination and appointment of their arbitrator. These notices purported to be under the provisions of the Lands Clauses Consolidation Act.

The plaintiff Board thereupon issued the writ in this action against Arthur Berton, the defendant, on behalf of himself and others the Estates Governors of Alleyn's College of God's Gift at Dulwich, and now moved for an interim injunction restraining the defendant from proceeding or taking any steps in connection with the settlement or determination of the question of disputed compensation in respect of the land comprised in the notice to treat of May 8, 1918, or for the purpose of settling the amount of compensation to be paid under the provisions of the Lands Clauses Consolidation Act, 1845, or by any means otherwise than under and in accordance with the Acquisition of Land (Assessment of Compensation) Act, 1919.

PETERSON
J.
1920
METRO-
POLITAN
WATER
BOARD
v.
BERTON

Roope Reeve for the plaintiffs. The plaintiff Board is a statutory corporation established by the Metropolis Water Act, 1902, for the purpose of managing the supply of water in and around London, and for taking over the undertakings of the Metropolitan Water Companies. The financial provisions of that Act show clearly that it is not a body of persons "trading for profit." That phrase means trading for the purpose of distributing dividends among its stockholders, and the Water Board does not so trade. That the Legislature regarded it as a body of persons not trading for profit appears from s. 84 of the Metropolitan Water Board (Various Powers) Act, 1907 (7 Edw. 7, c. clxxiv.), which provides that certain sections of the Water Companies (Regulation of Powers) Act, 1887 (50 & 51 Vict. c. 21), shall in all respects apply and have effect as if the Board were a trading company supplying water for profit.

This Board is a body of persons, not trading for profit, authorized by the Act of 1902 to carry on a water undertaking within the definition of "public authority" in s. 12, sub-s. 2, of the Acquisition of Land (Assessment of Compensation) Act,

PETERSON 1919, and the amount of compensation for the land in question must be assessed under the provisions of that Act and not under the Lands Clauses Acts.

J.
1920
METRO-
POLITAN
WATER
BOARD
v.
BERTON.
—

Hughes K.C. and *Dighton Pollock* for the defendant. The Water Board was established to take over the undertakings of seven water companies which were all companies trading for profit. The Board took over all the rights and duties of the existing water companies and the shareholders were paid in water stock. The trade of the companies was the sale of water, and that is the trade of the Board. It sells the water with a view to making a profit on the sale, and must do so to pay the interest on the water stock. Profit is the amount of the trading receipts over the trading expenses: *Russell v. Town and County Bank* (1) per Lord Herschell; *Mersey Docks and Harbour Board v. Lucas* (2); *Port of London Authority v. Inland Revenue Commissioners* (3); and we submit that the Board in trading in order to pay expenses and distribute the surplus as dividends is trading with a view to making a profit within the meaning of those decisions.

Sect. 84 of the Metropolitan Water Board (Various Powers) Act, 1907, was enacted to remove a doubt referred to in the recitals to the Act, and so far from showing that the Board is not a trading company supplying water for profit, has rather the contrary effect.

Roope Reeve in reply.

PETERSON J. The question in this case arises under the Acquisition of Land (Assessment of Compensation) Act, 1919. The Metropolitan Water Board, under statutory powers, gave notice to the Governors of Alleyn's College of God's Gift at Dulwich of their desire to acquire certain land. Thereupon the Governors gave notice of arbitration under the Lands Clauses Act. The question whether or not they are entitled to do so depends upon the Act of 1919. [His Lordship read sub-s. 1 of s. 1 of the Act and continued:] The cause of the present contest is to be found in s. 2, which provides that

(1) (1888) 13 App. Cas. 418, 424. (3) [1919] 2 K. B. 608; [1920]

(2) (1883) 8 App. Cas. 891, 904. 2 K. B. 612.

"No allowance shall be made on account of the acquisition being compulsory." PETERSON J.

It is not disputed that the Metropolitan Water Board is authorized to acquire the land in question compulsorily, and therefore if it is a public authority the question of compensation must be determined in accordance with the provisions of the Act of 1919. The Act of 1919 defines a public authority as any body of persons not trading for profit, authorized by or under any Act to carry on a railway, canal, dock, water or other public undertaking.

1920
METRO-
POLITAN
WATER
BOARD
v.
BERTON.

The Act of 1902, which constituted the Metropolitan Water Board, provided for its constitution. Sect. 1, sub-s. 3, of that Act enacted that: "Subject to the provisions of this Act, the Water Board shall consist of a chairman, a vice-chairman and other members; the chairman and vice-chairman shall be appointed by the Water Board, and the other members shall be appointed" by the various county, borough, urban district and other councils therein mentioned. The Water Board thus consists entirely of persons who are nominated by local authorities except the last two, who are appointed one by the Conservators of the River Thames and the other by the Local Government Board. By s. 2 the various undertakings of the existing Water Companies of the Metropolis were transferred to the Water Board.

Sect. 3 provides that: "The Water Board shall hold the undertaking of each metropolitan water company and may exercise all the rights, powers, authorities, and privileges of the company, and shall (to the exclusion of the company) be subject to all the duties, obligations, and liabilities of the company under the Acts, whether local or general, and the charters, orders, and other provisions relating to the company." Then there are provisions for the issue by the Water Board of water stock to various persons who take water stock in respect of their interests in the undertakings of the companies which are transferred. The water stock is to bear interest at a rate not exceeding 3l. per cent. Sec. 8, sub-s. 1, provides that the Water Board shall within a limited period "purchase or redeem, and pay off, all redeemable debenture stock and

PETERSON J. 1920 METROPOLITAN WATER BOARD v. BERTON.

all mortgage debts, and any stock so purchased or redeemed by the Board shall, as from the date of the purchase or redemption, be extinguished and cancelled." There are thus provisions by which the income of the Water Board is to be applied, after keeping down expenses, in paying the interest on the stock and in providing for the sinking fund for the redemption of the liabilities of the Water Board, and there is a provision that if there be a deficiency in the receipts the deficiency is to be made good out of the rates.

The question is, whether under the Act of 1919 the Water Board is or is not a body of persons not trading for profit authorized by the Act to carry on a water undertaking. There is no doubt that the Water Board is a body of persons authorized by this Act to carry on a water undertaking, and the only question is whether the Water Board is a body of persons which trades for profit. The contention is that the Board is, within this section, a body of persons trading for profit, because its aim necessarily is that its income should be such as to enable it to pay not merely the trading expenses but also the debenture interest, and to satisfy the statutory obligations with reference to the sinking fund. It is said that any surplus over trading expenses is profit, and as the Board is trading with a view to gaining something that is in excess of the trading expenses the Board must be trading for profit. My attention was called to two Acts, the Act of 1887, the preamble of which is: "Whereas it is expedient to make further provision with respect to the powers of Companies supplying water for profit in England," and the Metropolitan Water Board (Various Powers) Act, 1907, s. 84 of which provides that "the provisions of sections 4 and 5 of the Water Companies (Regulation of Powers) Act, 1887, shall in all respects apply and have effect as if the Board were a trading Company supplying water for profit." I think that when the Act of 1907 was passed the Legislature would have been startled by the suggestion that the Water Board was a company supplying water for profit. From s. 84 it would appear that when the Legislature passed the Act it considered that the Water Board was not a trading company supplying water for

profit. If the defendant's view of the meaning of the words "trading for profit" be correct, it is difficult to imagine any body of persons authorized by or under an Act to carry on a railway, canal, dock, or other public undertaking, who do not trade for a profit.

It appears to me on the plain sense of this section that what the Legislature meant to do was to draw a distinction between a body of persons, such as an ordinary railway company, which trades for profit, and a body of persons who are unlike a railway company, inasmuch as they do not trade for the purpose of making a profit which would be available for the purpose of division in the form of dividend. I think that on the true meaning of this section any body of persons authorized by statute to carry on a public undertaking which does not trade with the object of making profits for themselves or distributing profit as dividend is a public authority within the Act of 1919, but that a body of persons, authorized by a special Act to carry on one of the undertakings referred to in the definition section of the Act of 1919, is excluded from the definition of "public authority" if the object of its trading is to make a profit for the purpose of distribution among its members. The distinction is drawn between an undertaking which is carried on for private gain and one which is carried on for the public benefit. The Water Board is, I think, trading, but in my opinion it is a body of persons who do not trade for a profit within the meaning of the section. The result therefore is that compensation must be assessed under the provisions of the Act of 1919 and not under the Lands Clauses Acts.

Solicitor for plaintiff Board : *Walter Moon.*

Solicitor for defendant : *Arthur E. Savill.*

R. M.

PETERSON
J.
1920
METRO-
POLITAN
WATER
BOARD
v.
BERTON.
—

RUSSELL
J.

1920
—
Nov. 3.

In re THOMAS.

THOMAS *v.* THOMAS.

[1920. T. 1039.]

Will—Construction—Devise—Gift over—Death without issue attaining twenty-one—Perpetuity—Validity—Wills Act, 1837 (1 Vict. c. 26), s. 29.

Testator (by will and codicil made in 1903 and 1906 respectively) gave freehold property to a niece absolutely, with a wish that it should not be sold and, if she should “die without issue who shall reach the age of twenty-one” it should go to a nephew:—

Held, on construction, that the testator’s intention was to give the property over on failure of issue to attain twenty-one whether that event occurred in the lifetime or after the death of his niece. Sect. 29 of the Wills Act, 1837, therefore, did not apply, and the gift over was void for perpetuity.

Whether s. 29 is intended to apply to the case of any but an entire failure of issue, *quaere*.

By the combined effect of a will dated May 25, 1903, and a codicil dated April 10, 1906, Henry Thomas gave a life interest in all his property so far as the rents of his property and the interest of his money were concerned to Ann his wife and after her death gave a freehold farm to his niece Elizabeth Thomas absolutely. He gave another farm to another niece, a shop and premises to a third niece, and an annuity of 5*l.* payable out of the farm given to Elizabeth to a nephew. He expressed a wish that none of the landed or household property should be sold and gave directions, in the event of sale, in favour of next of kin or others. He then gave part of another farm to another nephew, Henry Eaton Thomas, and the residue of his real and personal property to his three nieces equally, and expressed a wish that H. E. Thomas should share equally in the residue, and proceeded: “I further wish that if any of my nieces should die without issue who shall reach the age of twenty-one then her or their properties named in the above will shall revert to my nephew Henry Eaton Thomas.”

The testator died on April 13, 1906, and the will and codicil were duly proved.

Elizabeth died on March 1, 1910, without having had issue.

The widow died on February 28, 1915.

H. E. Thomas died on October 28, 1915.

His administratrix took out a summons to determine the question who was entitled to the farm given to Elizabeth.

RUSSELL
J.

1920
THOMAS,
In re.

THOMAS
v.
THOMAS.
—

D. D. Robertson for the plaintiff.

Farwell for Elizabeth's husband entitled to take out administration to her estate. The gift over must be construed as meaning after a general failure of issue, a failure of issue at any time, and is void for remoteness. The absolute interest therefore goes to Elizabeth's representative: *Candy v. Campbell*. (1) Sect. 29 of the Wills Act does not apply. It does not apply where a contrary intention appears. Here there is some, though not very strong, indication of contrary intention in the testator's evident desire to keep the farm in his niece's family. But in any case, apart from contrary intention, s. 29 does not apply. The meaning of the section is that, for it to apply, it must be possible, at the death of the first taker, to know whether the gift over takes effect. Here it cannot apply because at the death of the first taker it might be impossible to say whether the issue would fulfil the condition of attaining twenty-one and so it would not be possible to ascertain at the death of the first taker whether the gift over would take effect. There is no case in the English reports which is definitely in point. In an Irish case, *Green v. Giles* (2), the point was raised and the same argument was raised as is now being raised (3), but the question was not decided, as the Lord Chancellor held there was a contrary intention.

[RUSSELL J. Was not one of the objects of s. 29 to avoid the operation of the rule against perpetuities?]

No doubt that was an object. In *Dawson v. Small* (4) the Court of Appeal held that the words "die without heirs male of his body lawfully begot" took the case out of the statute. On the other hand Kekewich J. held, in *In re Edwards* (5),

(1) (1834) 2 Cl. & F. 421, 427.

(3) *Ibid.* 34.

(2) (1855) 5 Ir. Ch. Rep. 25.

(4) (1874) L. R. 9 Ch. 651.

(5) [1894] 3 Ch. 644.

RUSSELL J. 1920
THOMAS, *In re.*
THOMAS v. THOMAS.
—

that a gift over on death “without leaving any issue male” was within it; but *Dawson v. Small* (1) was not cited to him or he would probably have come to a different conclusion.

[RUSSELL J. I am troubled by the actual words of the section. Does “indefinite failure of issue” apply to failure at an indefinite time of a particular class?]

Difficulty is felt in saying it does. In *Morris v. Morris* (2) Romilly M.R. says that s. 29 has no application to cases in which the words “die without issue” are combined or coupled with other words, such as “dying under twenty-one.” *Sanders v. Ashford* (3) has some bearing as showing that there is not an indefinite failure of issue if the gift over is on failure of a particular class of issue. These cases show that s. 29 must be construed strictly and is not to be applied unless the words of the will are actually brought within it. They support the view that the case of death without issue of a particular class is not within the words of the section and in that case the section does not apply. And, if the section does not apply and there is no estate tail, the gift over comes in and is void for remoteness.

[He also referred to Hawkins on Wills, 2nd ed., pp. 256–7.]

D. D. Robertson in reply. The gift over to H. E. Thomas is good. The contingency which the testator contemplated, of Elizabeth dying without issue who should reach the age of twenty-one, has exactly happened.

[RUSSELL J. The question is whether the words the testator has used mean failure of issue at her death or indefinite failure of issue.]

They cannot mean indefinite failure. If they did, the gift over would be void for remoteness. The testator did not mean that. There is no authority for the proposition that the effect of the words “who shall reach the age of twenty-one” is to sweep away the operation of s. 29 of the Wills Act. It is true it is difficult to fit the section in with the actual language of the testator. But nevertheless the section applies.

[RUSSELL J. May it not be that there is failure of issue

(1) (1874) L. R. 9 Ch. 651.

(2) (1853) 17 Beav. 198.

(3) (1860) 28 Beav. 609.

at death, if under twenty-one then though attaining it afterwards ?] RUSSELL
J.

Yes. The Court will if possible find something in a will so as to give effect to a testator's obvious intention. It is not necessary that it should be possible to ascertain at the death of the first taker positively who is to be the next taker, so as to be able to see, for the purpose of the rule against perpetuities, whether the gift over takes effect or not.

[RUSSELL J. Sect. 29 does not say it is. The authorities help little.]

He referred also to Theobald on Wills, 7th ed., p. 709, and *In re Brailsford* (1) was mentioned.

Gavin Simonds for next of kin of Elizabeth, interested in another question, took no part in this argument.

RUSSELL J. The question which I have to decide is whether, under the clause in the codicil, the farm given to Elizabeth went over on her death to Henry Eaton Thomas or whether the gift to him if Elizabeth should "die without issue who shall reach the age of twenty-one" was void for perpetuity. If the latter is the true view, the property goes to Elizabeth's husband who survived her and is entitled to take out administration to her estate; if the former, it goes to those claiming under H. E. Thomas.

Apart from s. 29 of the Wills Act, the gift to H. E. Thomas would, it seems clear, be void for perpetuity. It is a gift over in the event of a person dying without issue who shall attain the age of twenty-one. That event—namely, the failure of the issue to attain twenty-one—is one which might not be ascertained until after the expiration of the period allowed by law. But it is contended that by virtue of s. 29 the Court must construe the clause as referring to an event to occur only in the lifetime or at the death of Elizabeth. The question is, does s. 29 apply? [His Lordship read the section down to "otherwise," saying that he need not read the proviso which followed, as it did not apply.] The general meaning of the section is that, apart from any contrary

1920
THOMAS,
In re.
THOMAS
v.
THOMAS.
—

(1) [1916] 2 Ch. 536.

RUSSELL
J.

1920

THOMAS,
In re.

THOMAS
v.
THOMAS.

intention appearing, reference in a devise or bequest to want or failure of issue is to be construed as meaning want or failure of issue in the lifetime or at the death of the person whose issue are spoken of. In the present case the words which the testator has used—namely, “issue who shall reach the age of twenty-one”—appear to me to mean and include both issue who reach twenty-one years of age in the lifetime of Elizabeth and issue who reach twenty-one years of age after her death. As I construe the codicil he has given the property over upon the following event: the failure of issue of Elizabeth to attain twenty-one whether that event occurs in her lifetime or after her death.

In the face of this intention appearing by the codicil it seems to me impossible to apply s. 29 and to construe “without issue who shall reach the age of twenty-one” in this case as meaning want or failure of issue in the lifetime or at the death of Elizabeth. Mr. Farwell has argued that the section does not apply to words importing only a partial and not a general failure of issue; and that here the testator is only referring to the failure of issue of a particular kind or class. Counsel on neither side has been able to find any authority on this question. But without deciding that s. 29 is not intended to apply to the case of any but an entire failure of issue, I hold that upon the wording of this codicil the section does not apply. That being so, the gift over to H. E. Thomas is void for perpetuity. The gift to Elizabeth, therefore, remains, and, subject to the payment of the annuity of 5*l.*, the farm goes to her husband on his taking out administration to her estate.

Solicitors for all parties: *Bell, Brodrick & Gray, for Clason Dähne & Davies, Pontardulais.*

A. L.

In re MEYRICK'S SETTLEMENT.

MEYRICK v. MEYRICK.

[1920. M. 663.]

RUSSELL
J.

1920

Oct. 26 ;
Nov. 16.

Husband and Wife—Reconciliation Deed—Provision in Event of Future Separation — Validity — Public Policy — “Take legal proceedings” — “Void”—Construction.

A provision contemplating future separation of spouses, in a deed executed by them while living apart with the object and result of bringing them together as man and wife, is not void on the ground of public policy.

MacMahon v. MacMahon [1913] 1 I. R. 428 and *Purser v. Purser* *ibid.* followed.

Pending a wife's petition for divorce, the husband and wife, living apart, executed a trust deed with the object and result of renewing cohabitation, containing a clause that, if husband or wife should at any time thereafter “take any legal proceedings” for divorce, then the trusts should be void and the trustees should hold the trust fund—which was entirely provided by the wife for the benefit of herself, husband and issue—in trust for the wife absolutely. On the wife subsequently presenting a petition for divorce and claiming the fund:—

Held, on construction, that “taking legal proceedings” meant taking proceedings and not taking successful proceedings, and that “void” meant void and not voidable by the party against whom proceedings were taken:

Held, further, that in taking proceedings the party taking them was not as against the other responsible or in default or blameable or committing a wrong, so as to be debarred from claiming that the clause took effect.

New Zealand Shipping Co. v. Société des Ateliers et Chantiers de France [1919] A. C. 1 applied. Lord Shaw of Dunfermline's statement of the principle as to a party not taking advantage of his own wrong, considered.

Held, also, that the clause was not against public policy.

View indicated by Lord Cottenham in *Vandergucht v. De Blaquiére* (1839) 5 My. & Cr. 229 adopted.

Held, therefore, without awaiting the result of the divorce proceedings, that the wife was entitled to the fund.

KATE EVELYN MEYRICK and Ferdinand Richard Holmes Meyrick were married on December 12, 1899. Six children had been born, when in 1910 Mrs. Meyrick presented a petition for dissolution of the marriage. (The Court was told that a cross-petition was presented by Mr. Meyrick.)

RUSSELL
J.
1920
MEYRICK'S
SETTLEMENT.
In re.
MEYRICK
v.
MEYRICK.
—

The husband and wife separated, and ceased to live together ; but negotiations were opened with a view to bringing them together again, which culminated in the execution of an indenture dated January 23, 1911. The indenture, made between the husband, the wife and trustees, recited that the divorce proceedings had been stayed on an agreement that such settlement and family arrangement should be executed as thereinafter expressed, and trusts were declared of a fund, entirely provided by the wife, for the benefit of the wife, the husband and the issue, with a provision for transfer to the trustees after the wife's death of her residuary estate to the value of £2500. Clause 17, the final, provided : " If either the husband or the wife shall at any time hereafter take any legal proceedings for restitution of conjugal rights or to obtain a divorce or judicial separation then and in any such case all and singular the trusts covenants powers and provisions hereinbefore contained shall be void but without prejudice to any act or thing previously done hereunder and the trustees or trustee shall thenceforth hold both capital and income of the trust fund or of so much thereof as shall not have been paid or applied under any of the trusts or powers affecting the same in trust for the wife absolutely." As a result of the agreement (a term of which was the execution of the deed) Mr. and Mrs. Meyrick came together again and resumed their married life. Two more children were born. On February 16, 1920, Mrs. Meyrick presented a petition for dissolution, on the ground of adultery and cruelty. The proceedings were being prosecuted, Mr. Meyrick defending them and alleging that the charges were without foundation.

On March 16, 1920, Mrs. Meyrick issued a summons for a declaration that, on the true construction of the settlement and in the events which had happened, she was absolutely entitled to the trust funds comprised in the settlement.

C. J. Mathew K.C. and *R. W. Turnbull* for the plaintiff.

P. S. Stokes for the husband. " Void " in the deed means voidable at the option of the person who does not take divorce proceedings, or at the instance of the defending and not the

attacking party: *New Zealand Shipping Co. v. Société des Ateliers et Chantiers de France*. (1) If a lease contains a clause that the lease shall be void if the lessee breaks the covenants the lessee cannot himself avoid the lease by breaking them, as the clause is for the benefit of the lessor, not of the lessee, and it is the landlord's option, not the tenant's, to determine the lease. The case should wait for the determination of the divorce proceedings; otherwise, if clause 17 is held valid and the wife's divorce proceedings fail, she will be profiting by her own wrong.

W. A. Greene for the children (infants). "Take any legal proceedings" in clause 17 means "take and succeed in any legal proceedings." It has never been held that a condition defeating a clause if a decree should be made by the Divorce Court is valid.

[RUSSELL J. Or invalid?]

Yes, or invalid. This case is within what Wood V.-C. says in *H. v. W.* (2): "It seems to me to be decided, that, by the policy of our law, no state of future separation can ever be contemplated (during the existence of coverture) by agreement made either before or after marriage. It is forbidden to provide for the possible dissolution of the marriage contract, which the policy of the law is to preserve intact and inviolate." In *In re Hope Johnstone* (3) Kekewich J. says: "There are many authorities, ancient and modern, shewing that the Courts abhor provisions in instruments of whatever kind contemplating the interruption of conjugal relations, and hold such provisions void as against the policy of the law." In *Cartwright v. Cartwright* (4) a condition, in an ante-nuptial settlement by the husband's father, that, if a separation should take place, the rents and profits of freeholds settled on trust for the wife for life should be paid to the husband, was held void as contrary to public policy. In *Duchess of Marlborough v. Duke of Marlborough* (5), Rigby L.J., after saying three cases, one a decision of the

RUSSELL
J.
1920
MEYRICK'S
SETTLEMENT,
In re.
MEYRICK
v.
MEYRICK.

(1) [1919] A. C. 1.

(2) (1857) 3 K. & J. 382, 387.

(3) [1904] 1 Ch. 470, 474.

(4) (1853) 3 D. M. & G. 982.

(5) [1901] 1 Ch. 165, 171.

RUSSELL
J.
1920
MEYRICK'S
SETTLEMENT,
In re.
MEYRICK
v.
MEYRICK.

Court of Appeal, had been cited, adds: "All these cases are alike in one respect. The parties to a marriage settlement, or what was equivalent to it, chose to bargain as to what should take place in the event of a future separation of the spouses. There can be no doubt that such a bargain is absolutely bad." If these defendants' contention is right, that "take proceedings" means "take successful proceedings," the clause may be against public policy. If the contention is wrong, and it means that by merely presenting a petition for dissolution the wife can avoid the settlement, it must be against public policy: for it must be against public policy that the matrimonial harmony should be in any way, at least in such a way, disturbed.

E. G. Eardley-Wilmot for the trustees.

Mathew K.C. in reply. *Cartwright v. Cartwright* (1) and *H. v. W.* (2) were decided before the Matrimonial Causes Act, 1857, which did not come into operation before January 1, 1858. The money brought into the settlement was the wife's, the husband contributing nothing, and the clause was quite a reasonable one in the circumstances. In *New Zealand Shipping Co. v. Société des Ateliers et Chantiers de France* (3) Lord Wrenbury says: "The rule is that in a contract 'void' is to be read 'voidable,' if the result of reading it as 'void' would be to enable a party to avail himself of his own wrong to defeat his contract. It may be stated either in the form that if one party is in default it is 'void as against him,' or that if one party is in default it is 'voidable at the option of the other party.' The two amount to the same thing." And Lord Atkinson says almost exactly the same. (4) The meaning of the clause is that the wife says, If you, the husband, drive me again into a position which I do not want to be put in, I shall avoid this arrangement. It is not contrary to public policy. The whole question of public policy is covered by *MacMahon v. MacMahon* (5), which is just this case. There is nothing in

(1) 3 D. M. & G. 982.

(3) [1919] A. C. 1, 15.

(2) 3 K. & J. 382.

(4) [1919] A. C. 9.

(5) [1913] 1 I. R. 428.

the policy of the law to render illegal, in an arrangement for reconciliation between husband and wife—which this is—such a provision as clause 17 : *Vandergucht v. De Blaquiere* (1) ; *Lord Rodney v. Chambers*. (2)

RUSSELL
J.
1920
MEYRICK'S
SETTLEMENT,
In re.
MEYRICK
v.
MEYRICK.

Stokes. The agreement was a compromise. At present the Court cannot say whether the wife had ground for taking proceedings. The husband does not go quite so far as to say that there must be proceedings which result in success to justify the wife in avoiding the settlement. It is sufficient to say that the Court cannot yet say the husband is to blame. He relies on *New Zealand Shipping Co. v. Société des Ateliers et Chantiers de France* (3) and adopts the argument for the infant children on public policy.

Greene. *Earl of Westmeath v. Countess of Westmeath* (4) is very much the other way than *Vandergucht v. De Blaquiere*. (1)

Cur. adv. vult.

Nov. 16. RUSSELL J. [after stating the facts]. Mrs. Meyrick claims that under clause 17 of the deed the trust funds now belong to her. Whether she is right or wrong in this contention, is the question which I have to determine. Her claim is actively opposed by Mr. Stokes on behalf of Mr. Meyrick. Mr. Greene, who appears for the infant defendants, most properly conceived it to be his duty to oppose the claim not merely by adopting the argument on behalf of Mr. Meyrick, but by a thorough and independent argument on behalf of his clients. It is opposed on three grounds : Firstly, it is said that clause 17, upon its true construction, means something more than it says : that the mere taking of legal proceedings is not sufficient to bring it into operation ; but that, in order for it to operate, it is necessary that the legal proceedings should result in a decree. I can see no justification for varying the plain meaning of the words used by the parties. The words “previously” and “thenceforth” clearly refer to some definite point of time already mentioned—namely, the taking of legal proceedings at any time after

(1) 5 My. & Cr. 229.

(2) (1802) 2 East, 283.

(3) [1919] A. C. 1.

(4) (1821) Jac. 126

RUSSELL
J.
1920
MEYRICK'S
SETTLEMENT,
In re.
MEYRICK
v.
MEYRICK.
—

January 23, 1911 ; and I can see no reason why I should insert or imply a different point of time—namely, the date of a decree—in the place of that which the parties so plainly stated in their deed. It was suggested that it was inconceivable that the parties should have intended that the wife should have it in her power to put an end to the trusts, by the mere presentation of a petition known by her to be wholly unfounded. It must, however, be borne in mind that the presentation of such a petition is a much more serious step than the issuing of a writ in ordinary civil litigation. It is essential that such a petition be accompanied by a verifying affidavit sworn by the petitioner. In my opinion the point of construction fails.

Secondly, it was argued that the word “void” in clause 17 must be read “voidable”; that is, voidable at the option of the party against whom the legal proceedings are taken. I cannot accept this view. It appears to me to be a view directly inconsistent with the language of the clause. The meaning and effect of the word “void” is shown by the clause itself, which declares an immediate trust for the wife absolutely. There is no hint or indication of any interval or of any delay in the commencement of this trust, or of any doubt as to its inception. There is an imperative direction to the trustees “thenceforth” (i.e., from the taking of legal proceedings) to hold the trust fund in trust for the wife absolutely. The trust for the wife commences automatically. I can see no ground, looking at the words used, for holding that the word “void” does not mean void; nor do I see any ground for holding that (legal proceedings having been taken) any person (much less the person against whom those proceedings have been taken) has any option in the matter. It was said however that, notwithstanding my view of the plain meaning of the clause, I was bound by authority in the House of Lords to come to a different conclusion. The decision relied upon was the case of *New Zealand Shipping Co. v. Société des Ateliers et Chantiers de France*. (1) In that case the respondents contracted to build

(1) [1919] A. C. 1.

a steamer for the appellants, the price being paid by instalments. The steamer was to be completed ready for trial by January 30, 1915. The contract contained the following clause (12.): "In case the builders become bankrupt or insolvent or shall fail or be unable to deliver the steamer within eight months from the date agreed by this contract, thereupon this contract shall become void and all money paid by the purchasers shall be repaid to them with interest. . . . Except only in the event of France becoming engaged in a European war, then the above limit of eight months shall be extended equal to the duration of the said war, but in no case to exceed eighteen months in all." The vessel was in course of erection when, on August 2, 1914, France became engaged in the European War, and the builders had been prevented (by unpreventable causes beyond their control within a clause of the contract) from completing the vessel ready for trial by January 30, 1915, and had ever since been prevented by the same causes. All the Courts took the view that the eighteen months referred to in clause 12 expired on July 30, 1916. The builders contended that in the events which had happened the contract became void on July 30, 1916, while the purchasers contended that under clause 12 the contract was voidable and at their option only. All the Courts (including the House of Lords) took the view that the contract meant what it said, that it had become void, and that the builders, not having brought about the avoidance by any wrongful act or default on their part, were not precluded from alleging that the contract was void.

As a decision this case does not assist the argument of the husband and children here. But reliance was placed on certain expressions contained in the speeches of the learned Lords (or some of them) from which I was asked to conclude (1.) that a person cannot claim that a contract is void where the avoidance has been brought about by his own act, and (2.) that accordingly Mrs. Meyrick cannot claim that the trusts of the deed are void, since the avoidance was brought about by her act in taking legal proceedings. Lord Finlay states that it is a principle of law that no one can in such a

RUSSELL
J.
1920
MEYRICK'S
SETTLEMENT,
In re.
MEYRICK
v.
MEYRICK.

RUSSELL
J.
1920
MEYRICK'S
SETTLEMENT,
In re.
MEYRICK
v.
MEYRICK.

case take advantage of the existence of a state of things which he himself has produced, and he gives, as illustrations under clause 12 of the contract before the House, that the builders could not claim that the contract was void by reason of their own bankruptcy or refusal to deliver or failure to deliver for causes within their control. In respect of all these matters the builders would (as between themselves and the purchasers) have been responsible and in default. Lord Atkinson throughout his speech proceeds upon the footing that a man shall not be permitted to take advantage of his own wrong; he assumes throughout that the act which brings about an event on the happening of which the contract is to be void is a wrongful or blameworthy act on the part of the person performing it, and that such person is a "blameable party." Lord Wrenbury takes the same view. Lord Shaw in language goes somewhat further. He says (1): "The stipulation as to the contract becoming 'void' is a stipulation in favour of both parties. This is subject only to this, that the conduct or situation of the party treating the contract as void shall not have been the means whereby the event which gives rise to the condition has been brought about. What I have ventured last to express appears to me to be sound in principle and to be a better and broader expression of the principle than a reference to either a party's own wrong or a party's own default, for without either definite wrong or default the action, or even the situation, of one of the parties may be sufficient to produce the condition." This passage was much relied upon; and it was said that Lord Shaw meant that a person could never by his own act bring about the event and claim to avoid the contract. Judging from the language used I do not think Lord Shaw meant this. If he did I cannot agree with him. Indeed, upon those lines, a clause specifically entitling either party to avoid a contract by serving a notice in writing upon the other side before a specified date would be wholly inoperative; inasmuch as the person serving the notice must always be the person whose conduct has been the means whereby the event has

(1) [1919] A. C. 12.

been brought about. I do not think, however, that Lord Shaw meant more than this, that there may be elements in the action or situation of one of the parties (not amounting to definite wrong or default) which may debar him as against the other party from avoiding the contract. Turning to the document in the present case, clause 17 specifically contemplates an active step being taken by the husband or wife, and provides that if such step is taken the trusts shall be void. It appears to me impossible to suggest that in taking such step the party taking it is as against the other "responsible" or "in default" or "blameable" or committing a "wrong"; neither can it be suggested that any other elements exist which would debar him or her from claiming that effect be given to the plain and natural meaning of the clause. In my opinion the second argument also fails.

The third ground of opposition to the wife's claim is of this nature. It is said that clause 17 contemplates a future separation of the spouses, and is, therefore, void as being against public policy. There can be no doubt that, upon the authorities as they stand, a contract between husband and wife during cohabitation for a future, as distinguished from an immediate, separation is void and inoperative, as being contrary to the policy of the law in relation to marriage. In the case before me the position was this: the spouses were already living apart; the object and the result of the deed was to bring them together again as man and wife. The question is whether a provision as to a future separation contained in a deed entered into while the spouses are not living together, and as the price and condition of terminating the separation, is void and inoperative as being contrary to public policy. There is no clear authority upon this point in the decisions of the English Courts. The question arose upon a motion for an injunction before Lord Cottenham in *Vandergucht v. De Blaquiere*. (1) It was claimed that an agreement made between spouses while separated, but with a view to reconciliation, was illegal and void, because it contained provisions as to a future separation. The Lord Chancellor did not

RUSSELL
J.
1920
MEYRICK'S
SETTLEMENT,
In re.
MEYRICK
v.
MEYRICK.

(1) 5 My. & Cr. 229.

RUSSELL
J.
1920
MEYRICK'S
SETTLEMENT,
In re.
MEYRICK
v.
MEYRICK.

decide the point, and the suit was afterwards compromised, but an extract from his judgment shows the inclination of his mind. He says (1): "It was argued that the agreement was illegal, as providing for a future separation. (2) If it were necessary to decide that point, the difficulty of endeavouring to reconcile the different authorities upon that subject, and to extract a sound rule from them all, would have to be encountered. In *Rodney v. Chambers* (3), a covenant providing a separate maintenance for the wife, in the event of a future separation, was held good. In *Durant v. Titley* (4) it was held good in the Court of Exchequer, and bad in the Exchequer Chamber by Lord Tenterden and Lord C. J. Dallas; but in *Jee v. Thurlow* (5), Lord Tenterden says, that the judges who decided *Durant v. Titley* (4) did not intend to shake any former decision; and in *Westmeath v. Salisbury* (6) the Court of Chancery in Ireland having held such a provision illegal, and an appeal having been brought before the House of Lords upon other grounds, so that this question was not before the House for decision, Lords Eldon and Lyndhurst expressed very decided opinions against the legality of such provisions for future separation. There are, no doubt, shades of distinction between the circumstances of those cases, and some facts in this case, which differ from them all, and particularly in this,—that the agreement, providing for the event of a future separation, was not entered into when the parties were living together, but was the price and condition of terminating a state of separation. There are many other cases applicable to this subject; but those I have referred to are sufficient to shew, if the question of the legality of the agreement were to be decided between these parties, that the question is of too much importance to be disposed of upon an interlocutory application. It could only be properly decided at the hearing; and an injunction in the meantime would be much of course. But it will have to

(1) 5 My. & Cr. 243.

(2) 2 East, 283; (1824) 2 B. & C. 547; Jac. 126, 140.

(3) 2 East, 283.

(4) (1819) 7 Price, 577.

(5) 2 B. & C. 547; see 551.

(6) (1831) 5 Bligh N. S. 339, see 366.

be considered how far, between these parties, such a question can arise.” RUSSELL
J.

I am not aware of any decision of the English Courts establishing that what I may term a reconciliation deed between spouses already separated is void if it contemplates a separation subsequent to the reconciliation. The question has, however, been considered and determined by the Court of Appeal in Ireland. In the cases of *MacMahon v. MacMahon* (1) and *Purser v. Purser* (2) the Master of the Rolls, Ross J. and the Court of Appeal all concurred in the view that a reconciliation deed executed in such circumstances is not void by reason of its containing provisions which contemplate a future separation. The weight and authority of those decisions are increased in no slight degree when I point out that the leading judgment in the Court of Appeal was delivered by the late Chief Baron Palles. I need not refer in detail to the facts and judgments in those cases. They were fully discussed before me. I am aware that decisions of the Irish Courts are not binding upon me; they are however entitled to the highest respect, and none more than the judgments of the Chief Baron. I have read and considered his judgment with care. I find it quite convincing upon the point under consideration, and I am content to adopt its reasonings and conclusions. I am accordingly of opinion that the third contention against the wife's claim also fails.

1920
MEYRICK'S
SETTLEMENT,
In re.
MEYRICK
v.
MEYRICK.

There will be the declaration asked for.

Solicitors: *Le Brasseur & Oakley; Crosse & Sons; Gibson, Usher & Co.; Greene & Underhill.*

(1) [1913] 1 I. R. 154, 428.

(2) Ibid. 422, 428.

RUSSELL
J.

HANSFORD v. JAGO.

1920

Nov. 17, 18,
19.

[1919. H. 1825.]

Easement—Right of Way—Simultaneous Conveyances by common Owner to different Persons—“Appurtenances”—Express Grant—Contrary Intention—Implied Grant—Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 6, sub-s. 2, 4.

In 1911 the owner of a piece of ground built four cottages on it, leaving in the rear of the back gardens of the cottages a strip some 10 to 12 feet wide enclosed between the garden wall and the hedge bounding the property and also closed at its upper end by a wall. The lower end was open to a highway and the strip extended along behind the four cottages, so that access could be obtained from the highway over the strip to the cottages through back doors in the back garden wall. The cottages were let until 1919 to various tenants who used the strip for obtaining access to the cottages by the back doors. The earth closets and cesspools were also emptied from the strip, and in the case of two cottages the only alternative mode of removing the contents was through the cottages in breach of the local by-laws. On January 2, 1919, the cottages were sold by auction to various persons, amongst whom were the plaintiff and some of the defendants. The evidence showed that at the sale the auctioneer announced that each house would have a back entrance. The cottages were conveyed to the respective purchasers on the same day, and in each a grant was made of the particular cottage “with the garden outbuildings and appurtenances,” and included the part of the strip adjoining that cottage. The plaintiff, whose cottage adjoined the highway, brought this action for a declaration that the defendants had no right of way over his part of the strip and an injunction accordingly. Although there was no made road over the strip, it was at the time of the sale worn and marked with rough tracks so as to make it apparent that the strip was used as a back approach to the cottages :—

Held, (1.) that the right of way being de facto enjoyed by the tenants up to the date of the conveyances passed by way of express grant under the word “appurtenances.”

Bolton v. Bolton (1879) 11 Ch. D. 968 explained.

Thomas v. Owen (1887) 20 Q. B. D. 225 followed.

(2.) That the right of way passed in any case under the words to be read into the conveyances under s. 6, sub-s. 2, of the Conveyancing Act, 1881, as the use of one of these words, “appurtenances,” did not suffice to exclude the others by showing a contrary intention within s. 6, sub-s. 4.

(3.) That even if there were no express grant of the right of way, such grant ought to be and could on the authority of *Brown v. Alabaster* (1887) 37 Ch. D. 490; *Swansborough v. Coventry* (1832) 9 Bing. 305; and *Allen v. Taylor* (1880) 16 Ch. D. 355, be implied. It was immaterial

that there was no formed road in existence at the date of the conveyances, as there were other indicia which made it apparent that the right was then being openly enjoyed. RUSSELL
J.

The judgment of Barton J. in *Donnelly v. Adams* [1905] 1 I. R. 154 discussed and explained.

Rudd v. Bowles [1912] 2 Ch. 60 applied.

1920
HANSFORD
v.
JAGO.

WITNESS ACTION.

In or about 1911 J. B. Dugdale purchased two pieces of ground adjoining each other in Wareham, Dorsetshire. The combined pieces of ground formed a plot of land, approximately rectangular in shape, and having a frontage to the west of about 90 feet on Bonnetts Lane and a return frontage to the south of about 137 feet on Carrion Lane. On this plot J. B. Dugdale built four cottages fronting Bonnetts Lane and known as Nos. 1, 2, 3 and 4 Bonnetts Lane, No. 1 having a return frontage along Carrion Lane. The cottages were built in one block set back some way from Bonnetts Lane, so as to leave a garden in front of each cottage. Nos. 1 and 4 did not extend right across their plots but Nos. 2 and 3 did, so that in their cases access to Bonnetts Lane from the yards in the rear of these houses could only be obtained through the houses. In the yards of Nos. 2 and 3 were cesspools which received the drainage from Nos. 1 and 2 and Nos. 3 and 4 respectively. The yards in the rear of the four cottages did not extend right up to the limit of the land to the east but terminated at a brick wall erected parallel to and some ten or twelve feet from the boundary. The strip of land so left to the east of this wall and hereafter called the strip was enclosed to the east by an existing hedge dividing the property from that of the adjoining owner, Captain G. M. Marston, and to the north by another wall, but was left open at the southern end where it opened into Carrion Lane. In the yards and against the brick wall already referred to were placed earth closets, and trap doors were left in the wall to enable them to be emptied from the strip. There were also back doors in the brick wall opening on to the strip.

Before the cottages were built plans showing the property laid out as already described were submitted to the Wareham

RUSSELL
J.
1920
HANSFORD
v.
JAGO.

Borough Council and approved by them. By the by-laws to which plans submitted to the Council had to comply, it was provided (By-law 75) that a privy erected in connection with a building should be constructed "in such a manner and in such a position as to afford ready means of access to such privy for the purpose of cleaning such privy and of removing filth therefrom and in such a manner and in such a position as to admit of all filth being removed from such privy, and from the premises to which such privy may belong, without being carried through any dwelling house." By-law 88 contained a similar provision in relation to cesspools.

The cottages when completed were let to tenants and remained in their occupation until 1919, when as a result of the death of J. B. Dugdale in July, 1918, the property was put up for sale by the devisee of the property under his will. The original intention was to dispose of the four cottages in one lot, but at the sale on January 2, 1919, it was announced that, with a view to enabling tenants to purchase their cottages, they were to be put up to auction separately; and the auctioneer then announced that the wall dividing any two cottages would be a party wall and, as found at the trial, though this was disputed, that each house would have a back entrance from Carrion Lane. At the sale No. 1 was purchased by the plaintiff, No. 2 by the defendant Elizabeth Wellstead, No. 3 by A. C. Brown, and No. 4 by the defendants S. H. Jago and his wife. The conveyances to the purchasers were all dated February 24, 1919, and executed at substantially the same time, the attesting witness to the vendor's signature being the same in each case. The conveyances were in substantially the same form and the parcels were: "All that messuage or dwelling house with the garden outbuildings and appurtenances belonging thereto situate in Bonnetts Lane Wareham aforesaid and known as No. . . . Bonnetts Lane." The boundaries were then given, and in each case the property conveyed was described as bounded "on the east by land belonging to Captain Guy Montagu Marston," so that each conveyance included the portion of

the strip immediately in the rear of the yard of the house conveyed. At the time of the sale it was arranged that Nos. 1 and 4 should cease to drain into the cesspools on Nos. 2 and 3, and accordingly the conveyances of Nos. 1 and 4 contained a provision "that the grant and conveyance hereby made shall not by virtue of section 6 of the Conveyancing . . . Act, 1881, or otherwise be construed to grant and convey any right of drainage in over and upon any other land and premises now or late of the vendor."

After the sale the question arose between the plaintiff and the defendants whether the four cottages had rights of way over the strip to Carrion Lane. The plaintiff refused to recognize the rights of the defendants over the strip, and in August, 1919, he erected a wooden and corrugated iron fence between his portion of the strip and that belonging to No. 2, Bonnetts Lane. This fence was pulled down by the defendant Benjamin G. Wellstead with the approval of his mother the defendant Elizabeth Wellstead.

Thereupon the plaintiff commenced this action claiming a declaration against all the defendants (other than the defendant B. G. Wellstead) that they had no right of way in respect of their respective premises over and across that part of the plaintiff's land lying outside his back garden wall and between such wall and the adjoining land of Captain Marston to and from Carrion Lane from and to their respective premises; and an injunction to restrain them from trespassing on the plaintiff's land. He also claimed against the defendants E. Wellstead and B. G. Wellstead damages for pulling down and destroying his fence.

At the hearing of the action a large amount of evidence was given, and Russell J. upon such evidence found the following additional facts: (1.) That from the date of the erection of the cottages down to the date of their sale the tenants and their friends and tradesmen constantly used the strip for passing to and from their back doors from and to Carrion Lane; that during the same period the earth closets were emptied by means of the traps in the back garden wall by persons coming on to the strip with carts and horses and

RUSSELL
J.
1920
HANSFORD
v.
JAGO.

RUSSELL J.
 1920
 HANSFORD
 v.
 JAGO.

so removed over the strip to Carrion Lane; and that the cesspools at Nos. 2 and 3 and the dustbins at all the houses were emptied in a similar manner; and (2.) that, while at the date of the sale there was no made-up road along the strip, it was worn and marked with rough tracks, so that no one seeing it could have doubted that it was used as a back approach to the cottages.

Bovill for the plaintiff. The onus is on the defendants.

Preston K.C. and *Farwell* for the defendants. There was an express grant of the right of way that was de facto being enjoyed at the date of the sale by the use of the word "appurtenances" in the parcels. But if not, there is such an express grant by virtue of s. 6, sub-s. 2, of the Conveyancing Act, 1881. Even if there was no such express grant there would be an implied grant of the right and an implied reservation out of the plaintiff's land for this purpose. If necessary the defendants will also contend that there is a way of necessity over the strip.

Bovill. The right of way did not pass under the grant of the "appurtenances": *Bolton v. Bolton*. (1) It was pointed out in *In re Peck and London School Board* (2) that *Bolton v. Bolton* (1) was not overruled by *Bayley v. Great Western Ry. Co.* (3), but that the correct view of this latter decision was that a grant of land carries a right of way along a visible road. Next the right of way does not pass by virtue of s. 6, sub-s. 2, because the use of one of the words to be read in under that sub-section, "appurtenances," shows a contrary intention within sub-s. 4: see *Beddington v. Atlee* (4), where the point was raised but not decided. Further there is no ground for implying this right here. A right of way can only be implied when there is a formed road: *Donnelly v. Adams* (5); and see *Nicholls v. Nicholls*. (6)

Preston K.C. in reply. That "appurtenances" will suffice to carry a right of the kind in question here is clear from

(1) 11 Ch. D. 968.

(2) [1893] 2 Ch. 315, 322.

(3) (1884) 26 Ch. D. 434.

(4) (1887) 35 Ch. D. 317, 331.

(5) [1905] 1 I. R. 154.

(6) (1899) 81 L. T. 811.

Thomas v. Owen. (1) Further the use of one of the words to be read in under s. 6, sub-s. 2, of the Conveyancing Act, 1887, cannot show a contrary intention within sub-s. 4: *Birmingham, Dudley and District Banking Co. v. Ross* (2), where Cotton L.J. did not suggest that the use of the words "with all rights, members and appurtenances to the said premises belonging" showed a contrary intention. Compare also *Cecil v. Langdon* (3), which is only useful as an analogous case. But even if neither of these arguments were correct there is a clear case for an implied grant to give effect to the intention of the parties: *Pwllbach Colliery Co. v. Woodman* (4); *Brown v. Alabaster* (5); *Rudd v. Bowles*. (6) It is true that these were not cases of a simultaneous transfer of the whole property but of retention of part by vendor. The fact of simultaneous transfer makes no difference, but all continuous and apparent quasi-easements pass: *Allen v. Taylor* (7); *Swansborough v. Coventry* (8); *Wheeldon v. Burrows* (9); *Phillips v. Low* (10); *Schwann v. Cotton*. (11) Lastly, it may be argued that the right in question here passed as a way of necessity, that is, necessary to the "convenient and comfortable enjoyment of the property": *Schwann v. Cotton* (11); but this point is one of greater difficulty and it seems unnecessary to press it here.

Bovill in reply on the cases. *Thomas v. Owen* (12) is not an authority that the word "appurtenances" will suffice to pass a quasi-easement such as is in question here. There the Court took the view that there was an existing easement at the material date. On the question of implied grant of a right of way, it is essential that there should be a formed road. This expression was used in *Brown v. Alabaster*. (5) To come within that case the Court must find not a mere intention but an executed purpose. Any one looking at the

RUSSELL
J.
1920
HANSFORD
v.
JAGO.

(1) 20 Q. B. D. 225.

(6) [1912] 2 Ch. 60.

(2) (1888) 33 Ch. D. 295, 307,
308.

(7) 16 Ch. D. 355.

(3) (1884) 28 Ch. D. 1.

(8) 9 Bing. 305.

(4) [1915] A. C. 634, 646.

(9) (1879) 12 Ch. D. 31, 51.

(5) 37 Ch. D. 490.

(10) [1892] 1 Ch. 47.

(11) [1916] 2 Ch. 459, 467, 469.

(12) 20 Q. B. D. 225, 230.

RUSSELL J.
 1920
 HANSFORD
 v.
 JAGO.

strip must have been left in doubt whether the strip would not be diverted to other purposes and that is why a formed road is so essential. There must be more than mere evidence of intention. In *Rudd v. Bowles* (1) it was the original lessor who was encroaching on the strip in question, and this was treated as a fraud on an innocent purchaser.

RUSSELL J. [after stating the facts and making the findings of fact stated above continued:] Those being the facts, Mr. Bovill very properly opened the case by putting in the conveyance to the plaintiff and saying that as it is a clear conveyance of the first of the cottages including the strip adjoining the cottage's yard the onus is on the defendants to establish their right over the strip. Mr. Preston accepted this, and the question is whether he has discharged that onus. The form of the action is this: The plaintiff having asserted his right to prevent any one passing over his portion of the strip by erecting a fence by way of obstruction it was pulled down, and thereupon he commenced these proceedings for a declaration that the defendants other than Benjamin G. Wellstead were not entitled to any right of way and for an injunction to restrain them from trespassing on his part of the strip and also against Benjamin G. Wellstead and his mother for damages for pulling down and damaging the fence.

The defence set up is fourfold. First, the defendants claim that there is in the conveyances an express grant of a right of way by reason of the property having been conveyed with the appurtenances, and they claim that the word "appurtenances" is apt to include and does include a right which, although not a right of way in any legal sense at the date of the conveyance, was a right that was de facto in the course of enjoyment at that date. Secondly, it is said that if the word "appurtenances" is not apt to include a quasi right of way of this nature, there is none the less an express grant of the right under the general words to be read into the conveyance by s. 6, sub-s. 2, of the Conveyancing Act, 1881. Thirdly, it is said that even if there is no express grant in

(1) [1912] 2 Ch. 60.

either of the two ways mentioned a grant of the right must be implied and authorities have been cited in support of that view. Lastly, it has been pleaded though not argued at any length that the defendants are entitled to the right of way as a way of necessity.

RUSSELL
J.
1920
HANSFORD
v.
JAGO.

Upon the first of these contentions the question is whether the word "appurtenances" in a conveyance will include something which was not an easement in a strict sense at the date of the conveyance. Mr. Bovill says that it will not, and he cites in support of this view *Bolton v. Bolton*. (1) That case related to a contract and not a conveyance. It was a contract by which the trustees and executors of T. J. Bolton agreed to sell to the School Board for London: "First, all those the several messuages and tenements described in the first schedule hereto, with their appurtenances and the inheritance thereof in fee simple free from incumbrances." The contract was dated in 1877, and therefore was entered into before the Conveyancing Act, 1881. Then in pursuance of this contract a draft conveyance was submitted by the School Board to the vendors. This draft conveyance contained a grant to the School Board of the lands, "together with all erections, fixtures, ways, lights, rights, privileges, easements, and appurtenances whatsoever to the said pieces or parcels of land and hereditaments respectively or any part thereof respectively appertaining, or with the same or any part thereof now or heretofore enjoyed or reputed as part or member thereof." The vendors struck out the words "or with the same or any part thereof now or heretofore enjoyed" and added words excepting a right of way into Portobello Road, but expressly granting a right of way into Lonsdale Road. The question was whether the contract justified the insertion of these words, and it was argued that it did not include a way to the land sold which the vendors had used over adjoining land of their own. Fry J. said: "The contract for the sale of the property does not contain any words with regard to the right of way. In my view, therefore, the contract was for the conveyance of the premises with all that

(1) 11 Ch. D. 968, 970.

RUSSELL
J.
1920
HANSFORD
v.
JAGO.

was appurtenant or appendant to them and nothing more. Mr. Bolton's trustees are perfectly willing to grant a right of way over the road which leads into Lonsdale Road; but they decline to grant a right of way over a road which leads into Portobello Road. The School Board contend that they are entitled to the latter right of way. The first question then is, was the way into Lonsdale Road, or was the way into Portobello Road appurtenant or appendant to Buckingham Mews, the property contracted for? In my opinion neither of the ways was either appurtenant or appendant. The common words 'with all ways thereunto appertaining,' strictly and properly speaking, never carry a right of way over another tenement of the grantor; and for this simple reason: When a man who is owner of two fields walks over one to get to the other, that walking is attributable to the ownership of the land over which he is walking, and not necessarily to the ownership of the land to which he is walking. . . . Therefore, in my judgment, the right of way claimed cannot be claimed as appurtenant or appendant to the property contracted for." All the decision comes to is that that particular contract was a contract for the sale of the land and its appurtenances in the strict sense. It is not a decision that the word "appurtenances" may not include something not an appurtenance in the strict sense; and, if it were, it would be inconsistent with the decision of the Court of Appeal in *Thomas v. Owen*. (1) There the Court of Appeal had to construe a lease which contained a demise to the plaintiff of a farm "and all houses, buildings, and appurtenances thereto belonging." The fact was that at some time before the date of the lease the person in occupation of the land enjoyed the privilege of going along the soil of a lane forming part of another farm but both the farms belonged to the same owner, so that there could not have been in any strict sense a right of way appurtenant to the farm being demised. The Court of Appeal held that the word "appurtenances" was apt in that case to include such a right of way as was being enjoyed at the date of the

(1) 20 Q. B. D. 225, 231.

lease. Fry L.J. said (1): "It was contended before us that the absence in the lease of 1878 of any other general words than the word 'appurtenances' made an important difference and distinguished this case from the earlier authorities to which we have referred. No doubt the word 'appurtenances' is not apt for the creation of a new right, and the word 'appurtenant' is not apt to describe a right which had never previously existed; and therefore the mere grant of all appurtenances or of all ways appurtenant to the principal subject of the grant has been held in many cases not to create a new right of way where the right was not pre-existing at the date of the grant. But from as long ago as the fourth year of Philip and Mary (*Hill v. Grange* (2)) the word 'appurtenances' has easily admitted of a secondary meaning, and as equivalent in that case to 'usually occupied.' Here at the date of the lease of 1878 Lon Car Glas was not in the occupation of the lessor but in that of the defendant, and the defendant had, as we have held, acquired an estate in it as against which the right of way was reserved, and reserved for the benefit of the land and house of the plaintiff, and under these circumstances we think that the right of way did pass under the word 'appurtenances.'" I prefer to follow that decision, and I hold therefore that the word "appurtenances" in these conveyances was apt to include and did include this privilege or right which was being enjoyed by the existing tenants at the date of the sale.

RUSSELL
J.
1920
HANSFORD
v.
JAGO.

In case however I am wrong in the view I have taken on this first point I proceed to consider the second point whether there was not in any case an express grant by reason of the words to be read into every conveyance under s. 6, sub-s. 2, of the Conveyancing Act, 1881. That sub-section is in these terms: "A conveyance of land, having houses or other buildings thereon, shall be deemed to include and shall by virtue of this Act operate to convey, with the land, houses, or other buildings, all outhouses, erections, fixtures, cellars, areas, courts, courtyards, cisterns, sewers, gutters, drains, ways, passages, lights, watercourses, liberties, privileges,

(1) 20 Q. B. D. 225, 231.

(2) (1556) Plowd. 164, 170.

RUSSELL
J.

1320

HANSFORD

v.

JAGO.

easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, houses, or other buildings conveyed, or any of them, or any part thereof, or at the time of conveyance demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to, the land, houses, or other buildings conveyed, or any of them, or any part thereof." If that were all, it is quite clear that the general words to be read in would have the result of making the conveyances include a grant of the privileges and rights which the tenants were enjoying up to the time of the conveyances. But it is said that by virtue of sub-s. 4 of the same section the general words are only read into a conveyance when a contrary intention is not expressed and that a contrary intention is shown here because the conveyances do contain the word "appurtenances." I am unable to accede to that view. It is a very strong thing to say that, when a section of an Act of Parliament provides that a conveyance of land having houses or other buildings on it is to be deemed to include a large number of different matters unless a contrary intention is expressed in the conveyance, the mere fact that the draftsman has elected to include one or two of these matters expressly in the conveyance should operate as an indication of an intention that the remainder should not be included. The point has not been hitherto decided, but in *Beddington v. Atlee* (1) Chitty J. considered the point but refrained from deciding it. So far as I am concerned my view is that the mere inclusion of the word "appurtenances" is not sufficient to show a contrary intention so as to exclude the operation of s. 6, sub-s. 2.

Supposing however that I should be wrong on both these points, there still remains for consideration the question whether a grant ought to be implied of the right in question here. On this point I will read a passage from Lord Parker's judgment in *Pullbach Colliery Co. v. Woodman* (2): "My Lords, the right claimed is in the nature of an easement, and apart from implied grants of ways of necessity, or of what are called continuous and apparent easements, the

(1) 35 Ch. D. 317, 331.

(2) [1915] A. C. 634, 646, 647.

cases in which an easement can be granted by implication may be classified under two heads. The first is where the implication arises because the right in question is necessary for the enjoyment of some other right expressly granted." That is the case of a right necessarily ancillary to the enjoyment of another right. Then he goes on: "The second class of cases in which easements may impliedly be created depends not upon the terms of the grant itself, but upon the circumstances under which the grant was made. The law will readily imply the grant or reservation of such easements as may be necessary to give effect to the common intention of the parties to a grant of real property, with reference to the manner or purposes in and for which the land granted or some land retained by the grantor is to be used: see *Jones v. Pritchard* (1) and *Lyttelton Times Co. v. Warners*. (2) But it is essential for this purpose that the parties should intend that the subject of the grant or the land retained by the grantor should be used in some definite and particular manner. It is not enough that the subject of the grant or the land retained should be intended to be used in a manner which may or may not involve this definite and particular use." Now it is quite clear here from the manner in which the land was laid out that the strip at the back of these four cottages was intended to be used in a definite and particular manner and in no other—that is, as an approach to the rear of the cottages.

Numerous authorities have been brought to my attention. In *Brown v. Alabaster* (3) Kay J. reviewed a large number of the previous authorities and deals with, amongst others, *Pearson v. Spencer* (4), of which the headnote is: "Where the owner of a farm divided it by his will into two portions, devising them to A. and B. respectively, and the portion of B. was landlocked, so that in order to reach it it was necessary that he should have a right of way over the property of A., and the devisor during his life had used a way in a certain direction over that property: held . . . that a right to use

RUSSELL
J.
1920
HANSFORD
v.
JAGO.

(1) [1908] 1 Ch. 630.

(2) [1907] A. C. 476.

(3) 37 Ch. D. 490, 503, 504.

(4) (1863) 3 B. & S. 761.

RUSSELL
J.
1920
HANSFORD
v.
JAGO.

that way passed to B. by the devise." Kay J. after reading that headnote says: "Now I pause there to say that this is distinctly an advance of the doctrine. That particular way was not of course necessarily a way of necessity. It was not held that a way of necessity passed, but that this particular way passed, and the ground of the judgment given by Erle C.J. is this (1): 'We have been much struck with the argument of Mr. Mellish, in which he contended that, if this right of way were taken as a right of way of necessity simply, the way claimed by the defendant could not be maintained; because we are inclined to concur with him that a way of necessity, strictly so called, ends with the necessity for it, and the direction in which the plaintiff says the way ought to go would so end. But we sustain the judgment of the Court below on the construction and effect of James Pearson's will taken in connection with the mode in which the premises were enjoyed at the time of the will. The testator had a unity of possession of all this property; he intended to create two distinct farms with two distinct dwelling houses, and to leave one to the plaintiff and the other to the party under whom the defendant claims. The way claimed by the defendant was the sole approach that was at that time used for the house and farm devised to him. Then the devise of the farm contained, under the circumstances, a devise of a way to it, and we think the way in question passed with that devise. It falls under that class of implied grants where there is no necessity for the right claimed, but where the tenement is so constructed as that parts of it involve a necessary dependence, in order to its enjoyment in the state it is in when devised, upon the adjoining tenement.' " That seems to me to describe the class of case where each tenement is so constructed that it involves dependency on an adjoining tenement in order to be enjoyed in the state in which it was sold. The matter is also put in another way in *Wheeldon v. Burrows* (2), which was also discussed by Kay J. in *Brown v. Alabaster*. (3) Kay J.

(1) 3 B. & S. 767.

(2) 12 Ch. D. 31.

(3) 37 Ch. D. 490, 504.

quotes from Thesiger L.J.'s judgment in the former case in these terms: "We have had a considerable number of cases cited to us, and out of them I think that two propositions may be stated as what I may call the general rules governing cases of this kind. The first of these rules is, that on the grant by the owner of a tenement of part of that tenement as it is then used and enjoyed, there will pass to the grantee all those continuous and apparent easements (by which, of course, I mean quasi-easements)'—and the interpretation there interposed is necessary, because, where the owner of two tenements grants one of them, there can be no easement at the moment of the grant over the other tenement, the two tenements having belonged to one and the same person, and an easement being a right over the land of somebody else—or, in other words, all those easements which are necessary to the reasonable enjoyment of the property granted, and which have been and are at the time of the grant used by the owners of the entirety for the benefit of the part granted.' " And then Thesiger L.J. adds that if the grantor intends to reserve any right over the tenement granted, it is his duty to reserve it expressly in the grant.

These principles *prima facie* apply to the present case subject to the question whether they apply when there has not been a sale of part and a retention of another part of a tenement but a sale of the whole by simultaneous sales to different persons. It seems to me to be clear on the authorities that the same principles do apply. In *Allen v. Taylor* (1) the headnote is this: "Where the owner of a dwelling house and adjoining land sells the house to one person and the land to another under contemporaneous conveyances, either purchaser being aware of the conveyance to the other, the purchaser of the land is not entitled to build thereon so as to obstruct the lights of the house." This is the general proposition of law, and then the headnote goes on to state the facts: "A testator being owner in fee of a piece of land with two dwelling houses thereon, and of another piece of land immediately adjoining, with a warehouse at the further

RUSSELL
J.

1920

HANSFORD
v.

JAGO.

(1) 16 Ch. D. 355, 357.

RUSSELL
J.
1920
HANSFORD
v.
JAGO.

end thereof, devised his real estate to his two sons and another person in trust for sale, giving his two sons, or either of them, an option of purchasing any part of his real estate. By two separate but contemporaneous conveyances, executed by the trustees of the will, the one piece of land and the two dwelling houses thereon were conveyed for value, 'together with all lights thereunto belonging,' and all the estate, etc., to the one son in fee, and the other adjoining piece of land and the warehouse were conveyed for value, together with all lights, etc., and all the estate, etc., to the other son in fee. An injunction was granted restraining the successor in title to the purchaser of the last-mentioned piece of land and warehouse from building on his land in such a way as to obstruct his neighbour's lights." Sir George Jessel M.R. there says: "There can be no doubt that the law as laid down by *Palmer v. Fletcher* (1) is the law of the present day; that is, that where a man grants a house in which there are windows, neither he nor anybody claiming under him can stop up the windows or destroy the lights. That is based on the principle that a man shall not derogate from his own grant; and it makes no difference whether he grants the house simply as a house, or whether he grants the house with the windows or the lights thereto belonging. In both cases he grants with the apparent easements or quasi-easements. All that is now, I take it, settled law. I take it also that it is equally settled law that if a man who has a house and land grants the land first, reserving the house, the purchaser of the land can block up the windows of the house. Then there comes a third case. Supposing the owner of the land and the house sells the house and the land at the same moment, and supposing he expressly sells the house with the lights; can it be said that the purchaser of the land is entitled to block up the lights—the vendor being the same in each case, and both purchasers being aware of the simultaneous conveyances? I should have said certainly not. In equity it is one transaction. The purchaser of the land knows that the vendor is at the same moment selling the house with

(1) (1663) 1 Lev. 122; 1 Sid. 167, 227.

the lights, and as part of one transaction he takes the land : he cannot take away the lights from the house." Applying that here Hansford, the plaintiff, knew that at the same time that he was buying the first cottage, the vendor was selling Nos. 2, 3 and 4 with the enjoyment of the strip at the rear of the cottages for going to and from the cottages from and to Carrion Lane. He cannot take away that right. Then Sir George Jessel M.R. continues: " But, as I said before, it is a question of what is the settled law on the subject. I see the point is so stated in almost so many words by Lord Chief Justice Tindal in *Swansborough v. Coventry*. (1) He says: 'In the present case the sales to the plaintiff and the defendant being sales by the same vendor, and taking place at one and the same time, we think the rights of the parties are brought within the application of this general rule of law,' namely, that a grantor shall not derogate from his own grant." It seems to me on the authority of that case and *Swansborough v. Coventry* (1) that the doctrine of implied grant applies equally to a case of simultaneous sales to different persons of the whole of a property. In the present case there would seem accordingly to be an implied grant of the right or quasi-easement enjoyed at the time of the conveyance of the four cottages.

Mr. Bovill however says that although a grant will be implied in certain cases, it has never been implied when the quasi-easement was a right of way except when there was a formed road. Let me recapitulate at this point my view as to the physical condition of the strip in question at the date of the sale. It is a strip of land between a wall and a fence about ten to twelve feet wide running the exact length of the rear of these four cottages and enclosed upon all sides except where it abuts on the highway. Each of the houses has a back door opening into it and there are also trap doors from the earth closets of the four houses opening into the strip. The surface of the strip was hard from being trodden on and there were tracks leading up to the back doors of the cottages. That to my mind can indicate only one thing to

RUSSELL
J.

1920

HANSFORD
v.
JAGO.

(1) 9 Bing. 305, 309.

RUSSELL J.
1920
HANSFORD
v.
JAGO.

a person observing it—namely, that the owner of that land has set apart the strip as a means by which the cottages were to enjoy access to Carrion Lane and the contents of the earth closets were to be taken away. Indeed, if I may quote the words of one of the plaintiff's own witnesses, Mansfield, "any sensible person would say that the back doors were for access to Carrion Lane"; I think he could have added "and that the strip was set apart to provide that access and to afford a means of emptying the earth closets."

Now what is required in the case of a quasi-easement is the quality of being apparent. That quality may be arrived at in different ways, and, no doubt, the easiest case is that of a made-up road; it is most important, if not essential, that the road should be made up when it is sought to establish the apparency of a quasi-easement of way over an unenclosed piece of land. But when every other possible indication is present as here and they all point to a defined and enclosed strip having been set aside to provide an access to the rear of certain houses, I certainly decline to hold, unless compelled to do so by authority, that the absence of a made-up road prevented the establishment of an implied grant.

Mr. Bovill relied on *Donnelly v. Adams* (1), not indeed as a decision, because the judgment of Barton J. in the Court of first instance was not adopted by the Court of Appeal, who reversed his decision on other grounds, but he relied on many expressions contained in the authorities cited by Barton J. and also on the whole tendency of that judgment and the opinion which appears to permeate it. In other words, he suggests that if the judgment of Barton J. is read it becomes abundantly clear that he was intending to show the necessity in such a case as this of establishing that there was a made-up road. I do not take that view. In that case there had up to the date of the severance been no user of any kind, much less was there any indication of an existing way. This is clear from this passage of Barton J.'s judgment (2): "I come to the real question at issue at the trial, namely, the

(1) [1905] 1 I. R. 154.

(2) [1905] 1 I. R. 162, 163.

question whether the right to these ways, or either of them, ought to be held to have passed by implication with the lease. The house was practically a new one. One tenant occupied it for a short time before plaintiff's father took the lease of 1888. But having regard to the date of the head lease of 1886, and to the fact that the house was the second one built upon the plot after the date of the head lease, the occupation of that tenant must have been brief. No question was put suggesting any previous user of these ways, or either of them, before the lease of 1888. There is no evidence of any previous user. Accordingly, this is not a case in which, in order to enjoy the premises 'in the usual manner as previously enjoyed,' there was any 'necessary dependence' upon the adjoining lands." The case sought to be established in *Donnelly v. Adams* (1) was that the grant of the ways might be implied from subsequent user. Thus Barton J. said (2): "Plaintiff's case is not rested upon prescription or lost grant or any ground of that kind. Her counsel rely upon the subsequent user, only as evidence of an implied grant. In addition to the subsequent user, plaintiff's counsel rely upon the existence of this back door as part of the demised premises, and upon the inconvenience of bringing coal in by the front door." Therefore it is clear what case the learned judge was dealing with. He then goes through the authorities to show that in such a case the mere existence of a door is not sufficient and will not make a quasi-easement appurtenant, but that it must be shown that there was a "visible way" or a "back lane or back passage" or a "manifest mode of access" or a "made or marked way" or a "defined road" or a "marked or defined way" or something "capable of being described or identified as a way." I have taken all these phrases from different parts of the judgment of Barton J., and it appears to me that every one of these phrases fits the condition of affairs here. I am not prepared therefore to accept and do not accept *Donnelly v. Adams* (1) or the cases there referred to as authorities to show that the absence of a made-up way is fatal to a claim to an implied grant of a

RUSSELL
J.

1920

HANSFORD
v.
JAGO.

(1) [1905] 1 I. R. 154, 162, 163.

(2) [1905] 1 I. R. 164.

RUSSELL
J.
1920
HANSFORD
v.
JAGO.

right of way of this character, and indeed when I turn to the decision of the Court of Appeal in *Donnelly v. Adams* (1) I find FitzGibbon L.J. saying (2): "The law is stated in *Geraghty v. M'Cann*. (3) I admit that neither by express nor by implied grant can a vague or uncertain right be created. Every lawful way must be capable of identification; it must have a *terminus a quo*, and a *terminus ad quem*. But it is not essential to a way that there shall be a beaten track between its *termini*. The precise line which a person must follow in exercising a right of way need not always be the same." And Holmes L.J. says (2): "Whatever may have been once thought, it is now settled that a grant of a right of way may be implied in a conveyance or lease over land belonging to the grantor or lessor and remaining in his possession; but it is contended on behalf of the defendant that this can only be done when at the date of the grant or lease there was on the servient tenement some physical indication of the way such as a made road or beaten track. It seems to me that there is no legal principle requiring such an artificial limitation."

Mr. Preston has relied upon *Rudd v. Bowles* (4), a decision of Neville J. where the headnote is as follows: "Defendant B. had granted to G. separate leases of four plots of land fronting on H. road and four houses which had been erected thereon by G. under a building agreement. The plan on each lease, which was made part of the description, showed a row of twelve plots with houses thereon fronting on H. road, including the house demised which alone was coloured, and a strip of land coloured brown running past the back of all the plots to E. road. The position of this strip on the plan suggested that it was intended to give access to the back of the plots, but there were no words on the plan expressing such an intention. This strip of land was included in the building agreement but not in the leases. The leases were executed in May, 1903, and they bore no date except the year 1903, but the dates July 27, 28, 29, 30, 1904, respectively, were

(1) [1905] 1 I. R. 154, 164.

(3) (1872) I. R. 6 C. L. 411.

(2) [1905] 1 I. R. 181, 184.

(4) [1912] 2 Ch. 60.

afterwards inserted by agreement between the parties. At the latter dates the houses had been completely erected and surrounded with a fence in which gates or openings had been made in the back fences giving access to and from the brown strip. This strip, which belonged to B., had never been fenced or marked off from the rest of B.'s land"—so that the strip only existed as such on the plan. "The plaintiff was a mortgagee of G. who had entered into possession and claimed a right of way over the brown strip." It was held there that an implied right of way over the brown strip was granted by the leases to the lessee and those claiming under him. The importance of that case is the state of facts there as regards the brown strip, which is stated as follows (1) "The gates had been regularly used by the occupiers of the houses, but the strip coloured brown had never been fenced or in any way marked off from the rest of the defendant Bowles' land at the back of the gardens, and therefore the occupiers in using their back gates had not confined themselves exactly to the brown strip." It is not like this case where the occupiers could not wander off the strip because it was a narrow, defined and enclosed channel. Neville J. says (1): "When the leases were originally executed the houses demised by them were nearly completed, but the fence at the back had not been erected. It must even then have been fairly obvious to any one inspecting the houses with the plan upon the leases before him, having regard to the laying out of the ground and the construction of the houses, that the back gardens were intended to open upon the four-foot strip of land indicated on the plan; while at the date which the leases bear the matter was made clearer, the back fences having then been erected, and the position of the gates defined." And then a little further on he says: "In my opinion, reading the leases in the light of the surrounding circumstances, an intention to grant a right of way must necessarily be inferred. Although the path was never made up, except by the putting down of a little gravel by some of the tenants outside their gates, it was used by the occupiers

RUSSELL
J.
1920
HANSFORD
v.
JAGO.

(1) [1912] 2 Ch. 60, 62, 65.

RUSSELL
J.
1920
HANSFORD
v.
JAGO.

of the houses until the happening of the events which led to the action. It is true that the lands behind the gardens, being waste land, and no boundary fence to the north of the four-foot strip having ever been erected, the tenants and the tradesmen passing from Enslin Road to the garden gates did not confine their user to the four-foot strip; but, inasmuch as there is no question here of the acquisition of a right by user, this seems to me quite immaterial." So that Neville J. there certainly took the view that the absence of a made-up road was not vital. It is often very important that there should be a made-up road, especially when the right is claimed over unenclosed land, but, where there are other indicia to show that a strip of land was intended to be used as a way, it is not necessary that there should also be a made-up road to establish the right.

The result is that even if I am wrong in thinking that there was an express grant of the right of way either by virtue of the use of the word "appurtenances" in the conveyances or by virtue of the words read into the conveyances pursuant to s. 6 of the Conveyancing Act, 1881, I should still hold that the vendor of the four cottages must be taken to have granted to each of them the right to use the strip in the rear of the cottages as a way in the same manner as it was being enjoyed by the tenants of these cottages before and up to the date of the conveyances. That will involve implying in the conveyances such reservations or grants as may be appropriate to confer this common right.

The only remaining point is whether the right to use the strip as a way could be established on the ground that it is a way of necessity. That has not been fully argued, and I can see that there would be serious difficulty in establishing it so far as the ingress and egress of individuals to and from the cottages are concerned, as there is an alternative means of approach available by the front of the cottages. I incline however to the view that a way of necessity might have been made out in respect of the right to get to the trap doors of the earth closets over the strip for the purpose of emptying them of their contents. As the property existed when it was

sold I am satisfied that it was not possible in the case of any of the houses to empty the closets otherwise than by the trap doors. If the closets had been provided with different arrangements, it might have been possible to empty those belonging to the first and fourth cottages without using the strip by taking the contents through to the front of the houses and so to Bonnetts Lane by paths alongside the houses; but it is not so with regard to the second and third cottages which extended right across the plots, so that the contents of the earth closets could only have been brought to the front of the houses by taking them through the houses contrary to the by-laws of the local authority. It is not however necessary for me to decide that point. I hold on the first three grounds that I have stated that the right of way was either expressly or impliedly granted and therefore that this action fails and must be dismissed with costs.

Solicitors : *Gibson & Weldon, for J. W. Miller, Wareham, Dorset; Robinson & Bradley, for E. S. Clark, Wareham, Dorset.*

H. C. G.

In re KORVINE'S TRUST.

LEVASHOFF *v.* BLOCK.

[1920. K. 226.]

Donatio mortis causa—Movables—Contemplation of Death—Memorandum of Trust—Donor of Russian Domicil—Conflict of Laws—Lex situs.

On February 27, 1919, K., a domiciled Russian then resident in London, having passed a sum of 1000*l.* to the joint account at a bank of himself and B., instructed B. in the presence of three other persons, in case of K.'s death, to pay his doctor's bills, funeral expenses, and debts, and to pass over the remnant of the 1000*l.* to the plaintiff L., a Russian lady then living in Switzerland. K. further instructed B. at the same interview to pass to the plaintiff certain Russian bonds, money, gold articles, and jewellery contained in a separate box in the custody of W. In 1917 before going on a perilous voyage the contents of this box had been left by K. in a sealed case with a friend with the view of providing for the plaintiff in the case of his death. On February 28, 1919, K. went into a nursing home for a serious operation and died on April 9,

RUSSELL
J.

1920

HANSFORD
v.
JAGO.

EVE J.

1920

Nov. 30.

EVE J.
1920
KORVINE'S
TRUST,
In re.
LEVASHOFF
v.
BLOCK.

1919, intestate. A memorandum of this message of K. was composed at the Russian Consulate in London and signed on June 18, 1919, by B. and two of the others present when it was given. K. had a wife and sons in Russia. B. lodged the balance of the 1000*l.* amounting to 818*l.* 19*s.* 2*d.* with the Russian Consul in London, and it was subsequently paid into Court under an order and the official solicitor was appointed to represent the estate of K.:—

Held, (1.) that the gift of the money, bonds, and jewellery constituted a good donatio mortis causa by English law. (2.) That the law to be applied to it was that applicable to gifts inter vivos and not that applicable to testamentary dispositions, notwithstanding that the subject matter of the donatio was liable to the donor's debts upon a deficiency of assets, and also subject to legacy and estate duty.

By this summons dated March 18, 1920, the applicant Lydia Levashoff, a spinster and a Russian subject, asked for a declaration that she was absolutely entitled to the balance remaining undisposed of of the sum of 1000*l.* mentioned in a memorandum of trust, or "Act," dated June 18, 1919; and also a like declaration as to certain bonds of the Russian Loan of Freedom, Russian and foreign money, gold, and other articles in the same memorandum or Act mentioned.

She also claimed an order giving the Consul-General for Russia liberty to lodge in Court to the credit of this action a sum of 818*l.* 19*s.* 2*d.* forming part of the balance of the 1000*l.*

The plaintiff was the daughter of a Lieutenant-General in the Russian Army, and came to London in 1909 at the age of twenty-three at a time when Admiral Louis Theodore Korvine, a friend of hers, was Russian Naval Attaché in London. In 1911 he left England for Russia, and was there in 1917 when the Revolution broke out. He escaped from Russia, and in October of that year came to England bringing with him such things as he could carry, including 30,000 roubles worth of bonds in the Russian Loan of Freedom.

Between July, 1914, and August, 1919, the plaintiff was in Switzerland and Admiral Korvine frequently wrote to her. In one letter dated November 29, 1917, just before starting for the Canary Islands when engaged on perilous work for the British Government, he told her that he had left the Russian securities in an envelope with Mrs. Wolkoff (wife of Admiral Wolkoff) to be given to the plaintiff if she came

to fetch it, and also that he would leave certain gold articles and valuables in a small leather case sealed with his seal with Mrs. Wolkoff with the view of providing for the plaintiff in case of his death. Subsequent letters were written by the Admiral to the plaintiff repeating that Mrs. Wolkoff had the 30,000 bonds of the Loan of Freedom for her.

On February 28, 1919, Admiral Korvine became dangerously ill and went into a nursing home in London, where he died on April 9, 1919.

It appeared that on February 27, 1919, the day before entering the nursing home, Admiral Korvine passed to the joint current account of himself and Commander Hermann Block in the International Banking Corporation, 36 Bishopsgate, London, 1000*l.*, and in the presence of Admiral Wolkoff, Mrs. Wolkoff, Commander H. Block, and Commander Baron Klodt, he instructed Commander Block, in case of his (Admiral Korvine's) death to pay all the bills to the doctors, the funeral expenses and his other debts, and the remnant of the 1000*l.* was to pass over to the plaintiff (then living in Switzerland). He also instructed Commander Block to pass to the plaintiff the 5 per cent. bonds of the Russian Loan of Freedom to the nominal value of 30,000 roubles, and Russian and foreign money, gold articles, and jewellery, which were in a separate box in the custody of Admiral Wolkoff. All the articles in this box were precisely named, and included a black leather case which contained the gold articles and jewellery. A memorandum or "Act" (as it was termed) summarizing this message of Admiral Korvine's was composed at the Russian Consulate in London, and signed on June 18, 1919, by the three gentlemen named therein and present at the time of the delivery of the message on February 27, 1919.

Admiral Korvine left a widow and three sons living in Russia. One of the sons, Captain Korvine, was at Baku, in the Caucasus, in July, 1919, and his mother and brothers were then at Luga in Russia. Their present addresses were not known.

In view of a claim to the property by Captain Korvine, Commander Block handed over the money and other

EVE J.
1920
KORVINE'S
TRUST,
In re.
LEVASHOFF
v.
BLOCK.
—

EVE J. 1920
 KORVINE'S TRUST,
In re.
 LEVASHOFF
v.
 BLOCK.

valuables mentioned in the memorandum to the Russian Consul in London for safe custody. By an order of Peterson J. dated May 10, 1920, it was ordered that the Russian Consul should be at liberty to lodge in Court the 818*l.* 19*s.* 2*d.* representing the balance of the 1000*l.* mentioned in the "Act" of June 18, 1919; and the official solicitor was appointed to represent the estate of Admiral Korvine. The money was accordingly paid into Court by the Russian Consul to the credit of the action. It was admitted that the late Admiral was a domiciled Russian subject.

Gover K.C. and *P. F. S. Stokes* for the plaintiff. The three essentials for a good donatio mortis causa are laid down in White and Tudor's Leading Cases in Equity, 8th ed., vol. i., p. 427, in the notes to *Ward v. Turner* (1), and they exist in the present case: (1.) It must be made by a donor in contemplation of the approach of death; (2.) It must be intended to take complete effect only after the donor's decease; and (3.) There must be a delivery of the subject of the gift to the donee for his own use or upon trust for another person or for a particular purpose.

An antecedent delivery is sufficient to satisfy the rule: *Cain v. Moon*. (2)

The first gift by the Admiral in 1917 of the securities and valuables before going on a perilous voyage to the Canary Islands was made in contemplation of possible death. The Admiral returned in safety, but the same articles were again disposed of on February 27, 1919, and the gift was perfected from the date of its creation by the death which followed. English law is applicable as it was an assignment of movables and the *lex situs* applies. The law of domicile does not apply to such a gift. No question of succession arises, it is a conditional assignment *inter vivos*: Dicey's Conflict of Laws, 2nd ed., p. 519, R. 143; *Embiricos v. Anglo-Austrian Bank*. (3)

G. R. Northcote for Commander Block.

(1) (1752) 2 Ves. Sen. 431.

(2) [1896] 2 Q. B. 283.

(3) [1905] 1 K. B. 677, 685.

H. T. Methold for the estate of Admiral Korvine. No doubt a gift of movables is governed by the law of the place where they are situated, and a succession by the law of the domicile. The question is whether a donatio mortis causa is a gift inter vivos at all: *In re Beaumont*. (1)

EVE J.

1920

KORVINE'S
TRUST,
In re.

LEVASHOFF

v.

BLOCK.

Here the gift does not take effect completely on delivery. It is a mere deposit of a chattel, a transfer of possession, not of property, and there is no case like this where the rule in *Dacey* has been applied.

The difference between a donatio mortis causa and a legacy is pointed out in the notes to *Ward v. Turner*, in *White and Tudor's Leading Cases in Equity*, vol. i., p. 425, and in *Williams on Executors*, 10th ed., p. 600; it differs from a gift inter vivos in that it is ambulatory, incomplete, and revocable during the donor's life. But it is subject to debts and legacy duty. The gift here, if not entirely a gift inter vivos, is in the nature of a succession on death, and that must be construed by the law of domicile of the donor. *In re Hudson* (2) shows that estate duty is payable on a donatio mortis causa, since it is "property which does not pass to the executors as such" within the Finance Act, 1894, as *Warrington J.* held in that case. (3) This gift, therefore, is ambulatory and not really complete until the death of the donor, and duty is payable on it.

Gover K.C. in reply.

EVE J. Two points are raised on this application. The first is whether the transaction of February 27, 1919, constituted a good donatio mortis causa. [His Lordship stated the facts relating to the gift and said that the evidence established that according to the law of this country the transaction of February 27, 1919, was a good donatio mortis causa.]

The next question is whether the law of this country is the law properly applicable in this case. The deceased Admiral was a domiciled Russian at the time of his death, and if the

(1) [1902] 1 Ch. 889.

(2) [1911] 1 Ch. 206.

(3) [1911] 1 Ch. 211.

EVE J. 1920
KORVINE'S TRUST,
In re.
LEVASHOFF v.
BLOCK.

applicant's interest were a succession arising under anything in the nature of a testamentary disposition or under an intestacy the law to be applied would be the law of the domicile. On the other hand it is not disputed that the rule as to gifts inter vivos is correctly stated at p. 519 of Dicey and that an assignment giving a good title to movables according to the law of the country where the movables are situate at the time of the assignment is valid. Which of these two rules applies to chattels the subject of a donatio mortis causa? Mr. Methold admits that the donee cannot be said to take under any testamentary disposition, but submits that neither can a donatio mortis causa properly be regarded as a gift inter vivos. He places it somewhere between the two, and argues that inasmuch as the title of the donee is not in fact perfected unless the donor dies, there is in it so great an element of succession on death as to bring it within the rule regulating testamentary dispositions rather than that applied to gifts inter vivos.

No doubt the gift is consummated by the death of the donor, but it is not a legacy or a testamentary act—it is I think a gift, though an incomplete gift, inter vivos—a gift subject to revocation by the act of the donor himself or by his recovery from his illness. If he dies without revoking the gift the donee's title is derived from the act of the donor in his lifetime and relates back to the date of that act. On these grounds, and notwithstanding that the subject matter of the donatio is liable to the donor's debts upon a deficiency of assets and is also subject to legacy and estate duty, I think the law to be applied is that applicable to gifts inter vivos and not that applicable to testamentary dispositions, and I so hold.

Solicitors : *Crosse & Sons ; Lee and Pembertons ; Official Solicitor.*

G. M.

In re STEEL WING COMPANY, LIMITED.

[No. 00375 of 1920.]

P. O.
LAWRENCE
J.

1920

Company—Winding Up—Right to present a Petition—Assignee of Part of Debt—“Creditor”—“At law or in Equity”—Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25, sub-s. 6—Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), ss. 130, 137.

Nov. 30;
Dec. 7.

The assignment of part of a debt does not operate to pass the legal right to that portion of the debt, as it is not an assignment within s. 25, sub-s. 6, of the Judicature Act, 1873.

Forster v. Baker [1910] 2 K. B. 636 and *Conlan v. Carlow County Council* [1912] 2 I. R. 535 followed.

Skipper v. Holloway [1910] 2 K. B. 630 not followed.

But such an assignment does operate in equity to transfer the part assigned and it constitutes the assignee a creditor in equity of the original debtor; and as such, he can, when the debtor is a company, present a petition for winding up the company under s. 137 of the Companies (Consolidation) Act, 1908.

In re Montgomery Moore Ship Syndicate (1903) 72 L. J. (Ch.) 624 followed.

He cannot, however, serve an effective demand for payment under s. 130, sub-s. 1, of the Act in the absence of the person entitled to the remainder of the debt, but must otherwise establish the company's inability to pay its debts.

The omission from s. 130 of the Act of 1908 of the words “at law or in equity,” which occurred in the corresponding s. 80 of the Companies Act, 1862, has not changed the law by limiting the meaning of the word “creditor” in s. 137 of the Act to creditor at law.

The suggestion to this effect in Stiebel's Company Law (2nd ed.) vol. ii., p. 912, not adopted.

PETITION to wind up the above-named company.

The following statement of the facts is substantially taken from the judgment:

Before the month of October, 1917, George Pauling held the controlling interest in and was the managing director of the company. He made advances to the company, in respect of which the company became largely indebted to him.

In the month of October, 1917, Pauling for valuable consideration transferred the whole of his shares and assigned the whole of his debt to Dermot Joseph Mooney, who thereupon became and has since acted as the managing director

P. O.
LAWRENCE
J.
1920
STEEL
WING
COMPANY.
In re.

of the company. The assignment of the debt was effected by an undated document under the hand of Pauling which, after setting out certain particulars showing a balance of 4632*l.* 2*s.* 2*d.* then due to him from the company, proceeded as follows: "And it is this balance that Mr. George Pauling hereby transfers to Mr. Mooney for his own benefit."

This assignment was brought to the attention of the company by Mooney on October 12, 1917, and thereupon the following resolution was passed at a Board meeting: "Mr. Mooney produced an assignment to himself of the debt amounting to 4632*l.* 2*s.* 2*d.* due by the company to Mr. George Pauling. It was resolved that a cheque for £300 be drawn on the London Joint Stock Bank and it be paid to Mr. Mooney in part satisfaction of the debt."

By an indenture dated July 30, 1920 (which was executed as the result of certain litigation between Mooney and the petitioner Frederick Thomas Lord), Mooney, for valuable consideration, assigned to the petitioner "an equal half part of the sum of 4632*l.* 2*s.* 2*d.* referred to in the minutes of the Directors of the company of the 12th day of October 1917 as aforesaid and the full benefit and advantage thereof. To hold the same unto the said Frederick Thomas Lord absolutely." Notice in writing of this assignment was duly given to the company on August 5, 1920, and by the same notice the company was required to pay to the petitioner forthwith the sum of 2316*l.* 1*s.* 1*d.*, being one equal half part of the said sum of 4632*l.* 2*s.* 2*d.*

The company having made default in payment of the sum of 2316*l.* 1*s.* 1*d.*, the petitioner on October 28, 1920, presented this petition for the winding up of the company.

The company denied that the amount of the debt owing to Pauling at the time of the assignment to Mooney amounted to 4632*l.* 2*s.* 2*d.*, and alleged that the true amount then owing was 3070*l.* 6*s.* 8*d.* and no more. They also contended that Pauling had not assigned but only agreed to assign the debt in question and relied on a letter from Pauling to Mooney dated July 3, 1917, and confirmed by Mooney, in which Pauling said: "I agree that when" certain payments

"shall have been paid over . . . to me" by the company, then called the Krieger Electric Carriage Syndicate Ltd., "I will transfer or cause to be transferred to you or as you may direct . . . (b) my claim to the balance of all moneys remaining owing to me upon loan account at that date."

P. O.
LAWRENCE
J.
1920
STEEL
WING
COMPANY.
In re.

Jenkins K.C. and *Roope Reeve* for the petitioner. A petition to wind up a company can be presented by a creditor at law or in equity. It is true that the words "at law or in equity" are omitted in s. 130 of the Companies (Consolidation) Act, 1908, although they had appeared in the corresponding section of the Companies Act, 1862, but this is because they became unnecessary after the passing of the Judicature Act, 1873; the suggestion in *Stiebel's Company Law* (2nd ed.), vol. ii., p. 912, that the omission had altered the law is incorrect: compare the similar omission in the later Bankruptcy Act which is so explained in *Williams' Bankruptcy Practice*, 11th ed., p. 46. The assignment of part of a debt comes within s. 25, sub-s. 6, of the Judicature Act, 1873, and operates to pass and transfer the legal right to it; but even if the petitioner were merely an equitable assignee of part of a debt he would still be a "creditor" of the company within s. 137 of the Act of 1908 and able to obtain a compulsory winding up order: *In re Montgomery Moore Ship Syndicate*. (1)

Serjt. Sullivan and *M. F. Healy* for the company. There was here no valid assignment by Pauling to Mooney but a mere agreement to assign. But in any case an assignee of part of a debt is not a creditor at law and such an assignee can only have been allowed to recover in *Brice v. Bannister* (2) per incuriam, as later decisions show.

In *In re Combined Weighing and Advertising Machine Co.* (3) it was decided that a garnishee who had obtained a garnishee order directing a company to pay him a debt due by it to a creditor did not thereby become a creditor of

(1) 72 L. J. (Ch.) 624.

(2) (1878) 3 Q. B. D. 569.

(3) (1889) 43 Ch. D. 99.

P. O.
LAWRENCE
J.

1920

STEEL
WING
COMPANY.
In re.

the company and could not therefore petition to wind it up. An assignee of part of a debt can be in no better position. The question whether such an assignee came within s. 25, sub-s. 6, of the Judicature Act was raised but not decided in *Durham Brothers v. Robertson* (1), *Jones v. Humphreys* (2) and *Hughes v. Pump House Hotel Co.* (3); but in the last of these cases Mathew L.J. expressed the opinion that it did not. In *In re Montgomery Moore Ship Syndicate* (4) the assignment seems to have been treated as an assignment of a fraction of a fund and the point that it was an assignment of part of a chose in action was not put. The only point discussed was whether an equitable assignee of a debt could petition for a winding up order. In any case the later authorities affect the value of that decision. In *Skipper v. Holloway* (5) Darling J. held that an assignment of part of a debt came within s. 25, sub-s. 6, of the Judicature Act, 1873, but Bray J. in *Forster v. Baker* (6) declined to follow Darling J.'s decision and decided the contrary. The latter decision was followed in *Conlan v. Carlow County Council*. (7) The assignment here does not therefore come within s. 25, sub-s. 6, of the Act of 1873 and there is no legal assignment.

Next the equitable assignee of part of a debt cannot petition to wind up the debtor company. The assignor is a necessary party in any action by the equitable assignee to recover. In *Brandt's Sons & Co. v. Dunlop Rubber Co.* (8) the presence of the assignor was dispensed with by consent, but the strict need for his presence was not overlooked by Lord Macnaghten. (8) It follows that the assignee of part of a debt cannot petition to wind up the debtor company, because on such a petition the assignor cannot be made a respondent: compare *In re Combined Weighing and Advertising Machine Co.* (9) Further, this petition is brought upon a statutory breach of obligation to pay, but there is no obligation to pay an assignee of part of a debt except in the presence of the assignor.

(1) [1898] 1 Q. B. 765.

(2) [1902] 1 K. B. 10.

(3) [1902] 2 K. B. 190, 195.

(4) 72 L. J. (Ch.) 624.

(5) [1910] 2 K. B. 630.

(6) [1910] 2 K. B. 636.

(7) [1912] 2 I. R. 535.

(8) [1905] A. C. 454, 462.

(9) 43 Ch. D. 99.

Jenkins K.C. in reply. The case of the garnishor is distinguishable. It is no question with him of an equitable right; but by an order made on the debtor in invitum he is to pay the garnishor. The garnishor is not a creditor. The need in an action by an equitable assignee of a debt to have the assignor present is to have the rights of all parties interested in the debt duly adjusted. There is no similar need in a petition to wind up for the order enures for the benefit of all creditors.

P. O.
LAWRENCE
J.

1920
STEEL
WING
COMPANY.
In re.

Dec. 7. P. O. LAWRENCE J. delivered the following written judgment. The main question arising on this petition is whether or not the petitioner Frederick Thomas Lord, the assignee of a definite part of a debt owing by the company, is a creditor of the company entitled to present a winding up petition within the meaning of s. 137 of the Companies (Consolidation) Act, 1908. [His Lordship stated the facts and continued.] It is not disputed that the company is insolvent and unable to satisfy the petitioner's demand, but nevertheless the company opposes the making of a winding up order.

The first point taken by the company is that the undated document by which Pauling transferred the debt of 4632*l.* 2*s.* 2*d.* to Mooney was not in fact an assignment of the debt operating in *præsenti* but merely an agreement to assign intended to operate in future on the happening of certain events. It was sought to establish this by a letter dated July 3, 1917, and by certain parol evidence. In my opinion neither this letter nor this parol evidence is admissible to contradict or vary the written assignment, the terms of which are unambiguous. Moreover there appears to me to be very little substance in this contention, as the company on October 12, 1917, accepted the document as having vested the debt in Mooney and actually paid him 300*l.* on that footing.

The next point taken by the company is that the deed of July 30, 1920, did not operate to pass to the petitioner the legal right to one half of the debt thereby assigned on

P. O.
LAWRENCE
J.
1920
STEEL
WING
COMPANY.
In re.

the ground that an assignment of part of a debt is not within sub-s. 6 of s. 25 of the Judicature Act, 1873. I am not sure whether in the circumstances of this case this point really arises. I can find no evidence that any notice in writing of the assignment of October, 1917, from Pauling to Mooney was ever given to the company. It would appear therefore that the legal right to the debt never passed to Mooney and that the latter was only an equitable assignee and could not confer upon the petitioner a legal right which he (Mooney) did not possess. As however this point was not taken by the company I will deal shortly with the question, which was fully argued, whether an assignment of a definite part of a debt is within sub-s. 6 of s. 25 of the Judicature Act, 1873.

Darling J. in *Skipper v. Holloway* (1) decided that such an assignment came within sub-s. 6. Bray J. in *Forster v. Baker* (2) dissented from this decision and held that it did not, and in the Irish case of *Conlan v. Carlow County Council* (3) Gibson and Boyd JJ. concurred in the opinion of Bray J. Although this point has been mentioned on at least two occasions by members of the Court of Appeal (see *Durham Brothers v. Robertson* (4) and *Hughes v. Pump House Hotel Co.* (5)), there is no decision of the Court of Appeal upon it. Having considered the arguments addressed to me in the present case I concur in the opinions of Bray J. and Gibson J. In the result I hold that even if Mooney did acquire the legal right to the debt the deed of July 30, 1920, did not operate to pass the legal right to one half of such debt to the petitioner, and that the petitioner is not a creditor of the company at law.

The next point taken by the company is that the petitioner is not even a creditor of the company in equity and that he stands in no better position than a garnishor of a debt due from the company and consequently cannot present a winding up petition (see *In re Combined Weighing and Advertising Machine*

(1) [1910] 2 K. B. 630.

(3) [1912] 2 I. R. 535.

(2) [1910] 2 K. B. 636.

(4) [1898] 1 Q. B. 774, 775.

(5) [1902] 2 K. B. 195.

Co. (1)). In my judgment an assignee of part of a debt stands in an entirely different position from that of a garnishor. A garnishee order does not operate to transfer the debt and does not constitute the garnishor a creditor either at law or in equity of the garnishee. The assignment of part of a debt however operates in equity to transfer the part assigned, and consequently in my judgment constitutes the assignee a creditor in equity of the company in respect of that part.

Mr. Jenkins, in opening the petitioner's case, referred to the suggestion contained in Stibel's Company Law (2nd ed.), vol. ii., p. 912, that, by reason of the omission from s. 130 of the Companies (Consolidation) Act, 1908, of the words "at law or in equity" which occurred in the corresponding s. 80 of the Companies Act, 1862, the word "creditor" in s. 137 of the Act of 1908 ought to be confined to a creditor at law. I accept Mr. Jenkins' submission on this point and hold that the omission was not intended to and did not in fact effect any alteration in the law but was occasioned solely because the words "at law or in equity" had become unnecessary since the passing of the Judicature Acts. I did not understand Serjt. Sullivan to dispute this proposition.

I am therefore of opinion that the word "creditor" in s. 137 of the Companies (Consolidation) Act, 1908, includes a creditor in equity as well as a creditor at law, and consequently that a creditor in equity can still petition for the winding up of a company.

But then Serjt. Sullivan contends that even if the petitioner be held to be a creditor of the company in equity, yet the word "creditor" in s. 137 of the Act of 1908, although it would include a creditor in equity entitled to the whole of a debt, ought not to be extended so as to include a creditor in equity entitled to part only of a debt. He maintains that the company are not legally bound to make any payment to such a creditor on being served with a demand by him for payment under s. 130, sub-s. 1. He points out that the petitioner could not recover payment from the company of half of the debt originally owing to Pauling except in an

P. O.
LAWRENCE
J.
1920
STEEL
WING
COMPANY.
In re.

P. O.
LAWRENCE
J.

1920

STEEL
WING
COMPANY.
In re.

action in which both Pauling and Mooney were joined as parties either as co-plaintiffs or as defendants, and that consequently the company could not be said to be guilty of any neglect within the meaning of s. 130, sub-s. 1, if they were to refuse or omit to pay one half of the debt to the petitioner on his demand unless Pauling and Mooney were to concur in such demand and à fortiori when, as in this case, Mooney, the owner of the other half, had given express notice to the company that they were not to make such payment.

In my opinion the contention that in an action by an assignee of part of a debt the Court would require the persons entitled to the remainder of the debt to be parties is well founded. Although it is not necessary to decide whether in the circumstances of the present case the Court would insist upon Pauling being made a party to such action, even if the assignment of October, 1917, were held not to have passed the legal right to the debt, I doubt very much whether it would be absolutely necessary to join Pauling as a party to any such action, as he would be merely a bare trustee of the debt for Mooney and his assignee and the Court could adjudicate completely and finally upon the rights of the parties in his absence (see remarks of Lord Macnaghten in *Brandt's Case*. (1)) As regards Mooney, however, I think there is no doubt that the Court would require him to be a party to any action brought by the petitioner to enforce payment of his half of the debt.

In my judgment, however, the fact that the petitioner cannot serve an effective demand for payment under s. 130, sub-s. 1, does not necessarily imply that the petitioner is not a creditor entitled to present a winding up petition under s. 137. Sect. 130 is devoted entirely to describing in what circumstances a company shall be deemed to be unable to pay its debts within the meaning of s. 129 (v), and in my opinion the mere fact that a creditor is unable to serve an effective demand under sub-s. 1 of s. 130 does not prevent him from being a creditor within the meaning of s. 137.

(1) [1905] A. C. 462.

It only amounts to this, that the petitioner cannot rely upon non-compliance with his demand as evidence of inability on the part of the company to pay its debts.

The main reason why an assignee of a part of a debt is required to join all parties interested in the debt in an action to recover the part assigned to him is in my opinion because the Court cannot adjudicate completely and finally without having such parties before it. The absence of such parties might result in the debtor being subjected to future actions in respect of the same debt, and moreover might result in conflicting decisions being arrived at concerning such debt. In my opinion, however, this reasoning does not apply to a winding up petition. After a winding up order has been made the Court in all cases when it is necessary will investigate, adjudicate upon, and settle the petitioner's debt as well as the debts of the other creditors. In the case of an assignee of part of a debt the Court in adjudicating upon his claim can and will do so in the presence of the persons entitled to the remainder of the debt, and the rights of all parties interested in the debt will be completely and finally settled once and for all.

For the reasons I have stated I come to the conclusion, first, that an assignee of a definite part of a debt is none the less a creditor in equity in respect of that part because, according to the accepted rules of procedure, the Court requires him to join the persons interested in the remainder of the debt as parties to any action he may bring to recover his part of the debt, and, secondly, that such an assignee is entitled to present a winding up petition under s. 137 without joining the persons interested in the remainder of the debt as co-petitioners or as respondents.

In coming to these conclusions I think that I am following the view taken by Byrne J. in *Montgomery's Case*. (1) Although according to the reports of that case the company did not appear and the learned judge did not specifically deal with the point that the petitioner was assignee of part only of the debt, yet he had his attention called to the cases upon this point, and in making the winding up order he must have

(1) 72 L. J. (Ch.) 624.

P. O.
LAWRENCE
J.

1920
STEEL
WING
COMPANY,
In re.

P. O.
LAWRENCE
J.

1920

STEEL
WING
COMPANY,
In re.

considered that an equitable assignee of part of a debt stood in the same position as regards his right to present a winding up petition as an equitable assignee of the whole debt.

The only other point which I must deal with is that the company disputes the amount of the debt. It is of course well settled that the Court will not encourage an attempt by a creditor by means of a winding up petition to enforce payment of a debt which is bona fide disputed. In the present case, however, the only dispute raised by the company is as to the amount of the debt owing by the company to Pauling at the time when he assigned it to Mooney. The company contend that the debt at that date amounted to the sum of 3070*l.* 6*s.* 8*d.* and no more, whereas the petitioner insists that it amounted to 4632*l.* 2*s.* 2*d.*, the sum stated in the assignment. I desire to say nothing on the merits of this question (which will be investigated in due course) except that, regard being had to the resolution of October 12, 1917, and to the position in the company occupied by the assignor and assignee respectively, there may be some difficulty in establishing the company's present contention. On the undisputed facts of this case therefore the petitioner is assignee of half of a debt admittedly owing by the company, which debt amounts to upwards of 3000*l.* and which debt the company is unable to pay.

In these circumstances it seems to me that it would be oppressive if I were to accede to the company's request and to dismiss the petition. The result of such dismissal would be that the petitioner would be compelled to incur the useless expense and delay of bringing an action against an insolvent company and of then again presenting a winding up petition founded on the judgment which *ex concessis* he is bound to obtain in such action.

In the result I hold that all the objections taken by the company to this petition fail and I make the usual winding up order.

Solicitors : *Spencer Cridland ; P. R. Christie.*

H. C. G.

EVANS v. BRUNNER, MOND AND COMPANY, LIMITED.

EVE J.

[1920. E. 920.]

1920

Nov. 17.

Company—Memorandum of Association—Objects and Powers—Chemical Manufacturers—Resolution—Validity—Grant for scientific Research—“Incidental or conducive” to the main object.

The memorandum of association of a limited company, formed to purchase and carry on the business of chemical manufacturers as its primary object, contained in clause 3 the various objects and powers ancillary to the main object, and concluding with one (s) whereby the company was enabled to do “all such business and things as may be incidental or conducive to the attainment of the above objects, or any of them.” At an extraordinary meeting the company passed a resolution authorizing the directors “to distribute to such universities, or other scientific institutions in the United Kingdom as they may select for the furtherance of scientific education and research the sum of 100,000*l.* out of invested surplus reserve account.”

A shareholder of the company, suing on behalf of himself and the other shareholders, claimed a declaration that this resolution was ultra vires the objects and powers of the company, and moved for an injunction to restrain the company from acting upon it. There was uncontradicted evidence by the chairman and directors of the company to the effect that they desired to encourage a class of men which would cultivate the scientific attitude of mind and be prepared to devote their abilities to scientific education and research, and that from this reservoir of trained experts the company could select the right men to instruct in the scientific investigation necessary for its purposes; and further that this was probably the most advantageous and profitable way in which this sum could be expended:—

Held, that having regard to the evidence the advantage to accrue to the company by the expenditure of this sum was direct and substantial, and not speculative or too remote; and the company had discharged the burden of proving that the proposed expenditure was also conducive to and indeed necessary for its continued progress as chemical manufacturers. ✓

MOTION.

The plaintiff, William Wynn Evans (suing on behalf of himself and all other the shareholders of the defendant company), was the holder of 476 fully paid ordinary shares of 1*l.* each in the company, and the action was (1.) for a declaration that a resolution passed by the defendant company at an extraordinary meeting held on August 4, 1920, was ultra vires the objects and powers of the company. The

EVE J.
1920
EVANS
v.
BRUNNER,
MOND
& Co.
—

resolution was "that the directors be and they are hereby authorised to distribute to such universities or other scientific institutions in the United Kingdom as they may select, for the furtherance of scientific education and research, the sum of 100,000*l.* out of investment surplus reserve account." The plaintiff also claimed (2.) An injunction to restrain the company from distributing the said sum or any part thereof by way of donation or otherwise for the purposes aforesaid. At the extraordinary meeting held on August 4, 1920, 89 members attended out of a total of 23,713, and 75 voted for and 14 against the resolution.

The defendant company was a company limited by shares and registered on February 24, 1881, under the Companies Acts, 1862–1880. The nominal capital of the company was now 15,000,000*l.* The objects of the company, as set out in clause 3 of the memorandum of association, were (a) to purchase, or otherwise acquire the business carried on by J. T. Brunner and L. Mond in partnership at certain towns in the county of Chester under the firm of "Brunner, Mond & Co.," and the goodwill and real and personal property belonging to or used in the said business; and (b) to carry on in all its branches the trade or business of chemical manufacturers. Various other ancillary objects and powers were specified in clause 3, and the last one (s) was: "The doing of all such business and things as may be incidental or conducive to the attainment of the above objects, or any of them."

There was an affidavit by Roscoe Brunner, the chairman of the directors of the company, stating that the company occupied a leading position in the chemical manufacturing industry throughout the world, and that the development of that industry depended increasingly upon the advance of pure science. The company's greatest difficulty was to find men sufficiently equipped by their previous studies to undertake research work. Hence a larger reservoir of men highly trained in the universities and scientific schools of the country was imperatively necessary to enable the company to recruit its staff and continue its progress. In

his judgment the proposed application of 100,000*l.* was eminently desirable in furtherance of the company's business of chemical manufacturers, and, exclusively regarding such business, he was of opinion that the outlay was essential. There were eleven other affidavits by directors of the company strongly in favour of the proposed expenditure as a step in furtherance of the company's business which required the scientific aid and trained assistants only obtainable from efficient schools and universities. An affidavit by the plaintiff stated formal matter and what happened at the meeting, but there was no contradiction of the evidence on behalf of the company.

EVE J.
1920
EVANS
v.
BRUNNER,
MOND
& Co.
—

Clayton K.C. and *Caradoc Rees* for the plaintiff. This resolution is ultra vires the company and one shareholder can object. The objects contemplated by the resolution are not within those specified in the memorandum of association. In the first place they are too wide and general and do not lead to any direct benefit to the company. The paramount object of the company is to carry on the business of chemical manufacturers, and not to advance science generally. Secondly, the proposed expenditure will be principally for the community at large, and in a measure only, and to an insignificant extent, for the benefit of this company. The resolution points to the furtherance of scientific education and research at universities such as Oxford or Cambridge and other scientific institutions in the United Kingdom. That may be a very laudable object to be promoted out of one's own money but not to be provided for out of other people's money against their will. If limited to chemical scientific research it might have been within the objects and unobjectionable, but this will not be for the direct benefit of the company, and is altogether too remote. If the application of 100,000*l.* is sanctioned why not a much larger sum, once the principle is established? The principle of law as to what is conducive to the company's objects is laid down by Lord Cairns in *Ashbury Railway Carriage Co. v. Riche*. (1)

(1) (1875) L. R. 7 H. L. 653, 667.

EVE J.

[EVE J. Is it not a question of fact ?]

1920

EVANS

v.
BRUNNER,
MOND
& Co.

The question of whether the ancillary object is incidental or conducive to the main object is a question of degree: Palmer's Company Precedents, 11th ed., pt. i., p. 471; *In re German Date Coffee Co.* (1); *Stephens v. Mysore Reefs Mining Co.* (2); *Tomkinson v. South Eastern Ry. Co.* (3) The benefit to be derived from the expenditure is also too remote.

[EVE J. referred to *Henderson v. Bank of Australasia.* (4)]

On these grounds, therefore, that the advantages to accrue to the company are too general, not direct and substantial, and too remote, we submit that this resolution cannot be supported as conducive and necessary for the company's business.

Maugham K.C. and *J. H. Stamp* for the defendants. This resolution is justified in two ways: (1.) As a "power"; and (2.) as an "object" under clause 3 (s) of the memorandum, as "incidental and conducive" to the attainment of the main object of the company. As to (2.), the distinction between "objects" and "powers" is pointed out by Lord Wrenbury in *Cotman v. Brougham* (5) and the pernicious practice of confusing them. The company were exercising enlightened self-interest in this proposed grant and were not acting for the benefit of universities. It is not in a direct sense an object, but the exercise of an express power to attain the main object of the company. It is not a legal question for the Court at all, but of fact on the evidence whether it is incidental, and conducive, to the carrying on of the company's business. Many things have to be done, such as advertising, which are not specified in the memorandum.

(2.) But, if not a power it is an object within clause 3 (s) and the doing of something incidental and conducive to the main object of carrying on a chemical business: *Simpson v. Westminster Palace Hotel Co.* (6); *Taunton v. Royal Insurance*

(1) (1882) 20 Ch. D. 169.

(2) [1902] 1 Ch. 745.

(3) (1887) 35 Ch. D. 675.

(4) (1888) 40 Ch. D. 170. *

(5) [1918] A. C. 514, 521.

(6) (1860) 8 H. L. C. 712.

Co. (1); Peruvian Rys. Co. v. Thames and Mersey Insurance Co. (2); In re Kingsbury Collieries and Moore's Contract. (3)

On the evidence before the Court the company needs men equipped to undertake research work, and also help from university laboratories. Subscriptions to universities would greatly assist the company in this respect. It was the unanimous opinion of the Board that this payment would be for the direct benefit of the company. The resolution is therefore valid and intra vires of the company.

Clayton K.C. in reply.

EVE J.
1920
EVANS
v.
BRUNNER,
MOND
& CO.
—

EVE J. At an extraordinary meeting of the defendant company held on August 4, 1920, a resolution was passed by a substantial majority in the following terms: "That the Directors be and they are hereby authorised to distribute to such Universities, or other scientific institutions, in the United Kingdom as they may select, for the furtherance of scientific education and research, the sum of 100,000*l.* out of the Investment Surplus Reserve Fund." The plaintiff, who is a holder of 476 fully paid shares, impeaches that resolution as being ultra vires on grounds which I will hereafter state. The company disputes the allegation that the resolution is ultra vires, and this action has been brought, nominally for an injunction to restrain the company from acting upon the resolution, but substantially to have the point determined whether or no the proposed application of this large sum of money is intra or ultra vires of the company.

The first thing to ascertain is the construction of this resolution; what is the nature and extent of the authority thereby conferred on the directors? I think one might paraphrase it in this way: it is an authority to the directors to expend this 100,000*l.* for the furtherance of scientific education and research, and for that purpose they may select, as participants therein, such universities or other scientific institutions in the United Kingdom as they think fit. It is an authority which is therefore limited in express terms,

(1) (1864) 2 H. & M. 135.

(2) (1867) L. R. 2 Ch. 617, 624.

(3) [1907] 2 Ch. 259, 267.

EVE J.
1920
EVANS
v.
BRUNNER,
MOND
& Co.
—

in that the money must be applied for the furtherance of scientific education and research ; its destination is to a certain extent indicated, but not very strictly limited, and the authority is certainly impressed with this implied obligation on those to whom it is given, that they shall exercise the discretion vested in them bona fide in the interests of the company whose agents they are. The question is whether such an application of the company's funds is within or without the power of the company. The defendants say that it is within an express power to be found in the company's memorandum of association. It has been argued that the clause which I am about to read is not really an object of the company properly stated in its memorandum but is only a power. No doubt for many years past a practice has obtained of mixing up objects and powers and inserting both in the memorandum, but for the purposes of to-day it is not necessary for me to distinguish between the two. Enough that I have the clause which I am about to read contained in the memorandum as one of the objects of the company. It is clause (s) of para. 3 of the memorandum, and it reads in this way: "The doing of all such business and things as may be incidental or conducive to the attainment of the above objects, or any of them." That clause again must be read with certain qualifications. You cannot pick out one of the objects enumerated under the letters (a) to (r) of para. 3, and having determined the particular act to be incidental or conducive to that object thereupon decide that the act is *intra vires*. The wide and general objects are to be construed as ancillary to the company's main purpose, and I apprehend that the act to be *intra vires* must be one which can fairly be regarded as incidental or conducive to the main or paramount purpose for which the company was formed. It is on these principles I propose to consider the questions raised upon this motion. It is beyond dispute that the paramount object for which this company was incorporated was the carrying on in all its branches of the trade or business of chemical manufacturers, and in order that any particular application of its funds can be justified

under clause (s) of para. 3 it is essential that it should be established that it is an application incidental or conducive to the business of chemical manufacturers. The company accepts that position, and nothing has been urged on its behalf contrary to that principle. The plaintiff, who filed no evidence except a formal affidavit proving the facts, asserts that this proposed application of the company's funds is not incidental and will not be conducive to the company's main purpose or object on several grounds. In saying that I do not intend to convey that he denies that the company may not to some extent benefit thereby as chemical manufacturers. His contention is that it is the community at large that will really be benefited by the proposed expenditure, and that the company, as part of the community, may derive some distant, remote and more or less insignificant benefit but a benefit out of all proportion to the cost.

He puts his case against the validity of the proposal on these grounds. First, it is argued the object is too general, in that it is not confined to the particular branches of science calculated to promote the company's paramount purpose; scientific education, it has been pointed out, extends over a very wide area, and may include astronomy, geology and other matters having no very direct connection with the manufacture of chemicals; the resolution therefore empowers the directors to place funds at the disposal of donees who might utilise them for the advancement of branches of science in which the company is not very closely interested. In support of these arguments counsel relies strongly on the character of the possible donees. He points out that the Universities of Oxford and Cambridge, with their wide range of scientific training and education, might well apply any grant made to them for education and research work of too general a nature to lead to any direct benefit to the company and yet be acting within the exact terms of the resolution. But even if the money be appropriated for scientific education and work directly related to the company's main object it is argued that any benefit arising therefrom to the company is too remote; there is nothing that reserves to the company

EVE J.
1920
EVANS
v.
BRUNNER,
MOND
& Co.

EVE J.
1920
EVANS
v.
BRUNNER,
MOND
& Co.
—

the services of men trained by the expenditure of this large sum, and the only benefit accruing to the company is that which it shares with the whole community from any advancement in scientific education and research: no direct benefit accrues to the company and no advantage preponderating over the advantage which every other member of the community receives. The plaintiff's argument therefore comes to this: Either this money is capable of being applied for education which will in no way benefit the company, or, if applied for branches of science in which the company is directly interested, its expenditure will not secure to the company any advantage over its rivals in trade or any other members of the public, and if either proposition is established the proposed expenditure cannot properly be held to be conducive to the company's main purpose.

I confess I do feel some difficulty on these points. The furtherance of scientific education and research generally might certainly appear to sanction the application of this large fund in part to scientific education not necessarily useful or beneficial to the company, and in the absence of the evidence to which I am about to allude, I should have been disposed to think the terms of the resolution somewhat indefinite and wide and calculated to give rise to the suggestion that the advancement of science rather than the direct benefit of the company had dictated it. But it appears from the evidence of the chairman of the company, supported by the evidence of all the other directors, that the company is not aiming by this contribution at securing the education of scientific men as specialists in its business. What it desires is to encourage and assist men who will cultivate the scientific attitude of mind, and be prepared to devote their time and abilities to scientific study and research generally. According to the evidence that is the class of men for whom the company is constantly looking out, a class of men of which the supply is very inadequate but who when obtainable are readily capable of adapting themselves to the investigation research and scientific work of the company. It is not intended to impose on the universities and other

institutions who may benefit under this grant any obligation to train men as specialists in the particular scientific work which the company undertakes. What is desired is to offer attractions to these who are prepared to take up science and to cultivate the scientific mind and scientific habits, and thereby to establish what one of the deponents speaks of as "a reservoir of trained experts" from which the company will be able to select the right men to instruct in the particular branches of scientific investigation necessary for the purposes of the company. The evidence establishes this much, that the company is in constant need of a reserve of scientifically trained men for the purpose of its business—that the business cannot be maintained if the supply of such men is deficient—that a deficiency is almost inevitable unless substantial inducements are forthcoming to attract men to scientific study and research—that the best agencies for directing these studies are the well-equipped universities and scientific institutions, and that the interest of the company does not require that the education and training should necessarily be confined to scientific work of the nature of that in which the company is solely interested. These considerations dispose I think of the objection raised to the wide and general nature of the reference in the resolution to scientific education and research ; it is not intended to limit the application of the money to the special branches of science affecting the company's business but to promote the training and education calculated to produce the class of men qualified to assist in maintaining the company's business.

But even though the resolution is not in all the circumstances impeachable by reason of the generality of the language in which it is expressed, objection is still raised to its validity on the ground that the expenditure will produce no direct and possibly very little indirect benefit to the company. In support of that argument it has been pointed out that these universities and scientific institutions, if they are not already so, will undoubtedly, in the no distant future, be resorted to by persons of capacity and industry from all parts of the world ; that it is not unlikely that some

EVE J.
1920
EVANS
v.
BRUNNER,
MOND
& Co.
—

EVE J.
1920
EVANS
v.
BRUNNER,
MOND
& CO.
—

of the keenest rivals of this company on the Continent of Europe will be amongst the first to avail themselves of the educational advantages and prizes to be obtained at our universities and scientific institutions and may even be recipients of part of the very fund contributed by the company, and that in this way the fund may be utilised, not for the benefit of individuals or the community at home, but for individuals, and it may be institutions of alien origin and in direct rivalry and competition with the company. There is no doubt much to be said in support of these views but it is difficult to see how they affect the question whether the resolution is ultra or intra vires; they relate rather to matters having an important bearing on the way in which the discretion vested in the directors should be exercised, but they do not in my opinion go to the validity of the resolution. I must assume that in exercising their discretion the directors will pay due regard to all these factors, and it will be for them to decide after full consideration whether any particular application of moneys forming part of the fund will be to the company's advantage.

For present purposes I think I must rest on the evidence of those responsible for the conduct of the company's affairs and accept as conclusive their unanimous opinion that this is probably the most advantageous and profitable way to the company in which this sum of money could be expended. They are as I say unanimous on this point; they have not been cross-examined, and there is no evidence given to the contrary. In those circumstances I do not think I should be justified in not accepting that evidence and acting upon it, and so doing I am forced to the conclusion that the advantages to accrue to the company are direct and substantial and not too speculative or too remote.

A number of cases have been cited, and a number of instances have been suggested, in the course of argument, where particular transactions, although they might be for the benefit of the company, have nevertheless been or could be held to be ultra vires of the company. No doubt that is so. When an act of the company is challenged on the ground

that it is beyond the powers of the company the challenge is not disposed of by proving that the act is beneficial to the company : it must be established that it is an act the doing of which is authorized by the company's constitution.

On the present occasion, assuming the plaintiff has made out a prima facie case, what the company has to establish to the satisfaction of the Court, is that the proposals embodied in this resolution are incidental or conducive to the attainment of the main object of the company. On the evidence I think that the company has discharged this burden and has proved that the proposed expenditure will not only be to the direct advantage of the company, but is also conducive to, and indeed necessary for, its continued progress as chemical manufacturers.

In these circumstances, although I think the case is one which has been very properly raised, it is not one in which I ought to interfere, and accordingly I make no order on the motion.

Solicitors : *Jaques & Co., for W. Wynn Evans, Wrexham ; Blyth, Dutton, Hartley & Blyth.*

G. M.

EVE J.

1920

EVANS

v.

BRUNNER,

MOND
& Co.

PETERSON *In re* DIRECT UNITED STATES CABLE COMPANY
J. AND THE WESTERN UNION TELEGRAPH
1919 COMPANY'S CONTRACT OF TENANCY.

Nov. 4, 5, 6,
7, 11, 12.

DIRECT UNITED STATES CABLE COMPANY *v.* WEST-
ERN UNION TELEGRAPH COMPANY. (1)

1920
Feb. 16, 17,
26, 27;
March 1, 2,
10.

[1919. D. 248.]

Emergency Legislation—Atlantic Cable—Contract of Tenancy—Relief—“Incur any forfeiture”—Courts (Emergency Powers) Act, 1917 (7 & 8 Geo. 5, c. 25), s. 2—“Enforcement of the contract”—“Shortage of shipping”—Courts (Emergency Powers) Act, 1919 (9 & 10 Geo. 5, c. 64), s. 1, sub-s. 1 (a), (b).

The plaintiffs were the owners and lessors to the defendants of a transatlantic cable under an indenture of lease which contained a covenant by the plaintiffs to keep the cable in repair, with a proviso that in the event of through communication being interrupted for more than eighteen months the defendants might determine the lease. The defendants were also owners of another transatlantic cable. During the war, in 1917, breaks occurred in both cables, and the plaintiffs and defendants being unable to agree which cable should be first reinstated, the Admiralty decided that the defendants' cable should be repaired first by the cable ship which had been chartered jointly by the plaintiffs and defendants for the repairs, and also gave incidental orders to the cable ship as to the port for recoaling and concerning menace from submarines. The defendants' cable was duly repaired, but owing partly to bad weather, partly to the submarine menace, and ultimately to a fractured piston rod, the plaintiffs' cable was not repaired within the eighteen months specified in the proviso, and the defendants determined the lease:—

Held, that the decision and orders of the Admiralty given for the purpose of assisting and not restricting the plaintiffs' endeavour to repair their cable, were not an interference with private rights of property within No. 2 of the Defence of the Realm Regulations made in pursuance of s. 1, sub-s. 1, of the Defence of the Realm Consolidation Act, 1914, so as to entitle the plaintiffs to relief under s. 2 of the Courts (Emergency Powers) Act, 1917; and further that whether or not the orders of the Admiralty in respect of coaling and submarines, which orders had not on the evidence prevented or restricted the repairs, were “regulations as to the navigation of vessels issued by the Admiralty” within No. 37 (1.) of the Defence of the Realm Regulations, the decision of the Admiralty as to the priority of repair of the defendants' cable was not such a “regulation as to navigation” so as to entitle the plaintiffs to such relief.

Held, also, that by their failure to observe a covenant in consequence

(1) An appeal was entered but ultimately not proceeded with; hence the delay in the publication of this report.—F. P.

of which the lease might be determined, the plaintiffs did not "incur any forfeiture" within s. 2 of the Courts (Emergency Powers) Act, 1917. They had their property returned to them, and lost their right to payment of rent, but that did not amount to a forfeiture.

Whenever the Court has to deal with a case involving questions of the kind to which the Courts (Emergency Powers) Act, 1919, relates, s. 1, sub-s. 1 (a), of that Act is to be treated as s. 1, sub-s. 1, of the Courts (Emergency Powers) Act, 1917.

The "enforcement of the contract or any term thereof" in s. 1, sub-s. 1 (a), of the Courts (Emergency Powers) Act, 1919, means the "putting in force" or "giving effect to" the contract or term, and is not confined to enforcing the same by action or legal proceedings.

Held, (1.) that inasmuch as there was no evidence that any cable ship had been sunk during the war, the shortage of ordinary merchant shipping must be disregarded, and that there was no "shortage of shipping"—i.e., of cable ships—occasioned by the war within s. 1, sub-s. 1 (a), of the Courts (Emergency Powers) Act, 1919; and (2.) that in the circumstances the plaintiffs were not entitled to relief under s. 1, sub-s. 2, of the Courts (Emergency Powers) Act, 1917, as amended by s. 1, sub-s. 1 (b), of the Courts (Emergency Powers) Act, 1919.

PETERSON
J.
1920
DIRECT U.S.
CABLE Co.
v.
WESTERN
UNION
TELEGRAPH
Co.
—

ADJOURNED SUMMONS.

The plaintiff company were the owners of a telegraphic cable from Ballinskelligs Bay, Ireland, to Bay Roberts, Newfoundland, and thence to Halifax, Nova Scotia, and Rye Beach, New Hampshire, in the United States of America. The section from Ireland to Newfoundland was known as the Deep Sea Section, whereas the other two sections between Newfoundland and Rye Beach were called the Shallow Water Sections. In 1912 considerable portions of the cable consisted of the original cable which had been laid in 1874. The defendant company owned or had the right of working various transatlantic cables including one known as the Anglo cable connecting Valentia with Hearts Content in Newfoundland.

By a lease dated March 1, 1912, the plaintiffs leased to the defendants their cable and the whole of their undertaking with certain exceptions for a term of ninety-nine years from April 1, 1911, at a large annual rent to be ascertained in manner described in sub-clauses (A), (B) and (C) of clause 2 of the lease.

By clause 4, sub-clause 2, of the lease the plaintiffs (therein called "The Direct Company") "covenanted with the

PETERSON J.
1920
DIRECT U.S.
CABLE Co.
v.
WESTERN
UNION
TELEGRAPH
Co.
—

defendants" (therein called "the Western Union Company")
" At its own cost to maintain the Direct Company's cables and any renewals and replacements thereof in good repair and proper working condition and to renew and replace the same from time to time as the same or any parts thereof respectively become worn out unusable lost or destroyed and to effect any necessary repairs renewals or replacements with the greatest possible dispatch after receiving from the Western Union Company notice that the same are necessary. Provided that in the event of any interruption in through communication between Ballinskelligs Bay and Rye Beach for a continuous period of more than twelve calendar months one-half of the rents mentioned in Clause 2 sub-clauses (A) and (B) shall cease to be payable until through communication shall have been satisfactorily restored and the whole of the said cables shall be again in good repair and proper working condition and provided also that in the event of any such interruption in through communication for a continuous period of more than eighteen calendar months the whole of such rents shall cease to be payable until through communication shall have been satisfactorily restored and the whole of the said cables shall be again in good repair and proper working condition and provided further that in the event of the Direct Company committing any breach of the covenant on their part to effect repairs renewals or replacements with the greatest possible dispatch or in the event of such interruption in through communication as aforesaid continuing for a continuous period of more than eighteen calendar months it shall be lawful for the Western Union Company to give to the Direct Company notice in writing determining the term hereby granted without prejudice nevertheless to the right of the Western Union Company to claim damages for breach of covenant on the part of the Direct Company."

In consequence of the break in the plaintiffs' deep sea cable hereinafter referred to, through communication was interrupted for more than a period of eighteen months, and accordingly the penal provisions in clause 4, sub-clause 2, of

the lease became operative. The plaintiffs alleged that the failure to restore through communication was occasioned by the Defence of the Realm Acts and Regulations and took out this summons for a declaration that they had been, under or by virtue of the said Acts and Regulations, or owing to the acquisition or user by or on behalf of the Crown for the purposes of the present war of certain ships or other property or by reason of shortages of shipping, wholly or partially restricted or ordered from doing the repairs in question and restoring the broken communications, and that it might consequently be declared pursuant to s. 1, sub-ss. 1 and 2, and s. 2 of the Courts (Emergency Powers) Act, 1917, as amended by the Courts (Emergency Powers) Act, 1919, that the plaintiffs ought not to incur the forfeiture or other penalties in respect of the failure to do all such repairs or restore such communications in the said contract or tenancy provided, or alternatively, that the said contract, or the terms of the proviso contained in clause 4, sub-clause 2, thereof might be suspended or annulled or any proceedings for the enforcement thereof, or of the terms thereof, or of some or one of them, stayed on the ground that the same could not be enforced without serious hardship.

On the hearing of the summons in Court, a considerable number of witnesses were called on either side and the result of the evidence and the arguments of counsel, material for the purposes of this report, are set out in the judgment of Peterson J. from which the following statement of facts is taken :—

“On the 22nd September, 1917, an interruption (hereinafter called the Eastern break) occurred in the Plaintiffs’ deep sea cable some 640 nautical miles from Ballinskelligs and this fact was notified by the Defendants to the Plaintiffs in due course. This break was not repaired until the 28th June, 1919; and as the eighteen months contemplated by Clause 4, sub-clause 2, of the Lease expired on the 22nd March, 1919, the Defendants on the 28th April, 1919, after the issue of the Originating Summons gave notice determining the lease and renewed this notice on the 5th May, 1919. The

PETERSON
J.

1920

DIRECT U.S.
CABLE Co.

v.
WESTERN
UNION
TELEGRAPH
Co.

PETERSON J.
1920
DIRECT U.S.
CABLE CO.
v.
WESTERN
UNION
TELEGRAPH
CO.

question is whether the Plaintiffs are entitled to relief under the Courts (Emergency Powers) Acts. In March, 1918, there was another break in the Plaintiffs' cable about 215 nautical miles East of Bay Roberts. This break is referred to hereinafter in this Judgment as the Western break. It was proved and was not, I think, disputed that a deep sea repair cannot be effected during the Winter months and that it was impracticable to remedy such a break during the Winters of 1917 and 1918. The effective period for repairing the Eastern break was the period between April and October or the beginning of November, 1918. On the 30th October, 1917, the Plaintiffs enquired of the owners of the *Faraday* whether they could charter that vessel for the Spring of 1918 for the purpose of repairing the Eastern break; and on the 13th November, 1917, the Defendants made a similar application for the purpose of repairing the Anglo cable. The owners were not however prepared to make a binding agreement for a date which was so far ahead. As there were a number of cables which required attention a meeting took place at the Admiralty on the 6th February, 1918, for the purpose of making arrangements for the repair of the various cables. At this meeting there were present representatives of the Admiralty, the War Office, the Post Office, the Pacific Cable Board, the Eastern and Associated Companies, the Commercial Cable Company, the Telegraph Construction and Maintenance Company, the Plaintiffs and the Defendants. The Admiralty suggested a programme for the purpose of securing that all the cables in question should be put into operation before the end of the Summer of 1918. The Chairman explained that the Admiralty was averse to subjecting such vessels as the *Colonia* and the *Faraday* to risks in waters infested by the German submarines. The Defendants proposed to repair the Anglo 1874 cable by 'laying in' 800 miles of new cable while the Plaintiffs proposed to 'lay in' some 300 miles of cable for the purpose of remedying the Eastern break in their cable. The Anglo cable had however a greater capacity than the Plaintiffs' cable and accordingly the Admiralty programme suggested that the

Faraday should be allocated to the repair of the Anglo cable and that the *John Pender* should repair the Plaintiffs' cable or that if the *John Pender* could not do this work the *Faraday* might do it on her return after completing the repairs to the Anglo cable. Mr. Miles who represented the Plaintiffs at this meeting pointed out that the *John Pender* was unsuitable for the work of repairing the Plaintiffs' cable and this fact was recognised by the other persons who were present at that meeting. He went on to say that while the Plaintiffs felt that they ought to have the first use of the *Faraday* they would not question the decision of the Admiralty if it were determined that in the national interests the Anglo cable should be repaired in the first instance; but he urged that the *Faraday* should take on board both the Defendants' 800 miles of cable and the Plaintiffs' 300 miles of cable in order that she might after repairing the Anglo cable proceed to the repair of the Plaintiffs' cable as this course would avoid the serious risks incidental to the return of the *Faraday* and her passage out for the second time through the danger zone. It was ultimately decided that the *Faraday* should attend to the repair of the Anglo cable and the Plaintiffs' cable and take with her the cable required for both repairs and that she should first 'lay in' the Anglo cable and then proceed to the repair of the Plaintiffs' cable. This meeting also made arrangements by which the other cable ships which were available were allocated to the requisite repair of other cables. The representatives of the Admiralty no doubt determined that the Anglo cable should be repaired first; but the Admiralty had previously expressed the view that the Plaintiffs and the Defendants should if possible settle the question of priority between themselves, and, as Commander Robinson said, it was of small importance to the Admiralty which of the two cables was repaired first and the Admiralty would not have interfered in any such arrangement so long as it did not prejudice the safety of the ship at sea. As the Plaintiffs and the Defendants could not agree on the point the representatives of the Admiralty came to the conclusion that having regard to the greater capacity of the Anglo cable

PETERSON
J.
1920
DIRECT U.S.
CABLE Co.
v.
WESTERN
UNION
TELEGRAPH
Co.

PETERSON
J.
1920
DIRECT U.S.
CABLE CO.
v.
WESTERN
UNION
TELEGRAPH
CO.
—

it should be repaired first. In the early part of 1918 the Plaintiffs and the Defendants jointly chartered the *Faraday*. It was at first arranged between the Plaintiffs and the Defendants that the Defendants' vessel, the *Lord Kelvin*, should endeavour to repair the Western break ; but by the 23rd April this suggestion had been abandoned, as there is a letter of that date from the Admiralty in which directions are given for the *Faraday* after completion of the repairs to the Anglo cable to repair the Western break and then to proceed to the repair of the Eastern break. This letter contains a direction that the ship if she requires coal should proceed to Sydney, Cape Breton. This direction was given for the purpose of avoiding the danger from submarines which would attend a return to Queenstown for the purpose of re-coaling. On the 12th May the *Faraday* sailed, and by the 1st July she completed the repair of the Anglo cable ; the work being finished in an exceptionally short time. On her way to Sydney to re-coal she located the Western break in accordance with directions which had been given by the Admiralty at the suggestion of Messrs. Clark, Forde & Taylor, cable experts, who supervised the repairs on behalf of the Plaintiffs. On the 23rd July she left Sydney for the Western break. There was some delay in effecting this repair owing to unfavourable weather ; but on the 17th August the work on this break was completed. She then started for the Eastern break ; but owing to the presence of a German submarine in the neighbourhood of this break she was ordered by the Admiralty to proceed to St. John's. She left that port on the 30th August and reached the Eastern break on the 6th September. Between that date and the 12th October the weather was so bad that work was only possible on one day. On the 12th October a submarine was reported in the vicinity, and the ship after reporting this fact to the Admiralty zig-zagged at full speed until the 15th October when she received instructions from the Admiralty to return to Sydney immediately. She reached Sydney on the 25th October. She then coaled, and after receiving permission from the Admiralty to sail left Sydney on the 5th November and reached the ground

on the 14th November. On the 15th November the piston rod in the starboard engine was fractured, and on the 16th November she proceeded by Admiralty instructions to Queenstown as she could not in her damaged condition continue the work of repairing the cable. This misfortune terminated the *Faraday's* operations for the year 1918. No further steps could be taken for the repair of the Eastern break before the Spring of 1919, and before the time arrived when a vessel could sail for the purposes of this repair the period of eighteen months from the 22nd September, 1917, expired and the Defendants gave notice which purported to determine the lease."

PETERSON
J.
1920
DIRECT U.S.
CABLE Co.
v.
WESTERN
UNION
TELEGRAPH
Co.

Romer K.C., Patrick Hastings K.C. and Whinney for the plaintiffs.

Maugham K.C., Douglas Hogg K.C. and Tyldesley Jones for the defendants.

Cur. adv. vult.

1920. March 10. PETERSON J. stated the facts above set out and continued: The plaintiffs' first contention was that this case comes within s. 2 of the Courts (Emergency Powers) Act, 1917. That section reads thus: "Where, by virtue of any contract of tenancy, any person is bound to do or abstain from doing or is under any liability if he abstains from doing or does any act or thing, and by virtue of any enactment relating to the defence of the realm or any regulation made thereunder the doing of such act or thing is wholly or partially restricted or ordered, he shall not, during the continuance of the contract or on or after the termination thereof, be liable to any mandatory order or any injunction or interdict in respect of such act or thing, or be liable to pay any sum of money or incur any forfeiture or other penalty in respect of the failure to do or the doing of such act or thing, if and in so far as the failure to do or the doing of such act or thing is attributable to compliance with such restriction or order as aforesaid."

The lease was no doubt a contract of tenancy within that section. It was urged that the plaintiffs were bound to repair the eastern break and that the repair of this break

PETERSON was restricted by virtue of an enactment relating to the defence of the realm or a regulation made thereunder. It is not suggested that, in the circumstances, they did not effect the repair with all possible dispatch. They used all possible endeavours to remove the interruption, but the circumstances were such as to prevent the completion of the repair before the expiration of eighteen months. They say, however, that they were under an absolute obligation to repair as well as an obligation to repair with all possible dispatch after receiving notice of the break from the defendants, and that the Admiralty decision that the Anglo cable should be mended first and the Admiralty order that if the *Faraday* required coal she was to go to Sydney, Cape Breton, and the two Admiralty orders turning the ship back to St. John's and Sydney restricted the doing of the repair and that failure to repair was due to these restrictions. These contentions involve the construction of clause 4, sub-clause 2, of the lease. It was urged by the plaintiffs that there are two covenants for repair, the first to maintain the cables in good repair, and the second to repair with the greatest possible dispatch after receiving notice from the defendants of any break, and that the power to determine the lease arose either in the case of a breach of the second covenant or in the case of a breach of the first covenant which extended over a period exceeding eighteen months. If this be the true construction of the clause there would under this first covenant be a breach from the moment when a break in the cable occurred, and whether the plaintiffs had notice of it or not and another breach if the plaintiffs did not after receiving notice proceed with all possible dispatch to repair. There would be two obligations, one to repair at once whatever the season of the year, and whether the plaintiffs had or had not been informed of the interruption, and the other to repair with all possible dispatch after receiving notice of the interruption from the defendants. The defendants contended that on the true construction of the clause the only breach would be if the plaintiffs after receiving notice from the defendants did not use all possible dispatch in effecting the necessary repairs.

and pointed to the fact that it is impossible to repair deep sea breaks in winter or to take steps to repair before the defendants, who alone could know the facts, informed the plaintiffs of the want of repair. I do not, however, find it necessary to determine this question. I will assume that the plaintiffs' construction of clause 4, sub-clause 2, of the lease is correct, and that they were under an absolute obligation to repair the eastern break, and not merely an obligation to repair with all possible dispatch after receiving notice of it. Was the repair restricted under an enactment relating to the defence of the realm or a regulation made thereunder? By the Defence of the Realm Consolidation Act, 1914, s. 1, sub-s. 1, His Majesty in Council has power to issue regulations for securing the public safety and the defence of the realm, and as to the powers and duties for that purpose of the Admiralty and Army Council, and may by such regulations authorize the trial by court-martial and punishment of persons committing offences against such regulations, and in particular against regulations designed—sub-s. 1 (b)—to secure the safety of any means of communication. The regulations (clause 2) issued under this Act enable “the competent naval or military authority, where for the purpose of securing the public safety or the defence of the realm it is necessary so to do,” to take possession of land and buildings to construct military works, to place buildings in a state of defence or to destroy them, to move or destroy property, to take possession of arms or warlike stores (including lines, cables and other apparatus intended to be laid or used for telegraphic purposes) and “to do any other act involving interference with private rights of property which is necessary for the purpose aforesaid.” It is said that the decision of the Admiralty that the Anglo cable should be repaired before the plaintiffs' cable is an interference with private rights of property within this regulation. Now the regulation relates to the taking possession and use of property belonging to the subject. It was not, I think, an interference with private rights of property, within this regulation, for the representatives of the Admiralty to decide that the Anglo cable should be

PETERSON
J.
1920
DIRECT U.S.
CABLE Co.
v.
WESTERN
UNION
TELEGRAPH
Co.

PETERSON J.
1920
DIRECT U.S.
CABLE Co.
v.
WESTERN
UNION
TELEGRAPH
Co.

repaired before the plaintiffs' cable. When the plaintiffs and the defendants could not agree which of their cables should be reinstated first, the Admiralty decided that the *Faraday*, which was to be chartered by both of them jointly, should proceed to the restoration of the defendants' cable in the first place. This was not, in my opinion, an interference with the plaintiffs' rights of property within the meaning of the regulation. Nor do I think that the order to the *Faraday* to recoal at Sydney, or the orders to return to Sydney or St. John's in consequence of the submarine menace, can properly be described as interference with the plaintiffs' rights of property within the meaning of the regulation. The first order was directed to securing the vessel from attack by submarines. Of the two orders to return, the first was to enable the *Faraday* to avoid the probability or possibility of being sunk by a submarine which was known to be in the neighbourhood of the eastern break; while the second was given for a similar reason, although subsequently the Admiralty came to the conclusion that probably the information that a submarine was in the vicinity of the break was due to a mistake. All these orders were given for the purpose of assisting and not restricting the plaintiffs' endeavours to repair their cable.

Reliance was also placed by the plaintiffs on reg. 37 (1.), which provides that every vessel shall comply with such regulations as to the navigation of vessels as may be issued by the Admiralty. It is said that the orders relating to coaling and the return of the *Faraday* to St. John's or Sydney, and also the decision that the ship should repair the Anglo cable first were regulations as to the navigation of vessels issued by the Admiralty. It may be that the order in respect of coaling and the return of the vessel to the American side of the Atlantic in order to avoid submarines were "regulations as to the navigation of vessels issued by the Admiralty," and I will assume that they were; but in my view the decision of the Admiralty at the meeting in February, 1918, when the plaintiffs and the defendants were unable to agree, that priority should be given to the repair of the Anglo cable cannot

properly be described as a regulation as to the navigation of the *Faraday*. The plaintiffs also relied upon reg. 39 BBB, (1.) and (7.), which enabled the Shipping Controller to make orders of the description mentioned in sub-clause 1, and to make arrangements with any other Government department to exercise this power on his behalf; but there was no evidence that the Shipping Controller ever made any arrangement with the Admiralty for the exercise by the Admiralty of the powers conferred upon him by the Regulation.

PETERSON
J.
1920
DIRECT U.S.
CABLE Co.
v.
WESTERN
UNION
TELEGRAPH
Co.

The plaintiffs also contended that they had incurred a forfeiture in respect of the failure to repair within s. 2 of the Act of 1917. But I do not think that a lessor can with propriety be said to incur a forfeiture, because the lessee exercises a power to determine the lease in consequence of the lessor's failure to observe a covenant. He has the property returned to him and loses the right to require payment of rent; but this does not appear to me to amount to a forfeiture. Moreover, in order to bring the case within s. 2 of the Act of 1917 it is necessary for the plaintiffs to show that the failure to repair the eastern break in 1918 is attributable to compliance with the orders of the Admiralty. This involves the proposition that but for these orders the break would have been repaired in 1918. So far as the order to coal at Sydney and the order to return to Sydney or St. John's are concerned, it cannot be said that they prevented the repairs. If they had not been given there is nothing to show that the repairs would have been made. Indeed in the case at least of one of the orders to return, if the *Faraday* had been allowed to proceed, there was the possibility that she might have been effectually prevented from further operations by being torpedoed; and, if she had been allowed to recoal at Queenstown, no one can say whether she would have passed and repassed safely through the danger zone. Nor do I think that these orders restricted the repair within s. 2 of the Act of 1917. They were made for the purpose not of restricting but of assisting the plaintiffs in effecting the necessary repairs. Nor can it be said with any confidence that, but for the decision which gave priority to the repair

PETERSON of the Anglo cable, the plaintiffs' cable would have been repaired in 1918. If the Admiralty had declined to interfere there is no ground for believing that the plaintiffs, rather than the defendants, would have secured the services of the *Faraday*. Both had sought to charter that vessel, and it was to settle the dispute between them that the Admiralty intervened. I cannot assume that in the absence of this decision the plaintiffs would have been able to secure the services of the *Faraday*, or any other cable ship. Moreover I am not satisfied that the failure to repair the Anglo cable in 1918 can properly be said to be attributable to this decision of the Admiralty, having regard to the consideration that all parties concerned thought that the arrangement for the despatch of the *Faraday* would result in the repair of both cables in 1918, and that the repair of the plaintiffs' cable was, in fact, prevented by the protracted stormy weather which the *Faraday* experienced in September and October after reaching the neighbourhood of the eastern break, and the delay occasioned by the presence of submarines. Assuming that the plaintiffs would have been able to charter the *Faraday* for their own use, the decision of the Admiralty might have been the secondary cause of the failure to repair the plaintiffs' cable; but the immediate and proximate cause was the unexpected duration of unfavourable weather in September and October, and the return of the vessel to the American side of the Atlantic in order to avoid the peril of submarines.

It is also suggested that but for the directions to repair the western break first, the eastern break might have been remedied in 1918. But it is apparent that the proposal to repair the western break before the eastern break came from the plaintiffs' advisers and agents, Messrs. Clark, Forde & Taylor, who recognized that the ship would have to go to Sydney for the purpose of recoaling, and that the proper course in the interests of economy was to repair the western break before going to the eastern break, instead of proceeding from Sydney to the eastern break, and then returning to the western break. This suggestion of the plaintiffs' agents was

acceded to by the Admiralty. In any case it is impossible to say, on the existing evidence, whether the *Faraday* would have succeeded in repairing the eastern break if she had left the western break until after she had dealt with the eastern break. I do not know what the weather conditions in the neighbourhood of the eastern break were at the time, and it appears to be very probable that the *Faraday's* work would have been interrupted by the submarine which caused her return to St. John's when she was on her way to the eastern break after the repair of the western break had been completed.

PETERSON
J.
1920
DIRECT U.S.
CABLE Co.
v.
WESTERN
UNION
TELEGRAPH
Co.
—

The plaintiffs then relied upon s. 1, sub-s. 1, of the Courts (Emergency Powers) Act, 1917, as amended by the Act of 1919, s. 1, sub-s. 1. Sect. 1, sub-s. 1, of the later Act provides that s. 1 of the Act of 1917 "shall have effect as if for sub-s. 1 thereof the following sub-section were substituted." This means that whenever the Court has to deal with a case involving questions of the kind to which the Act of 1919 relates, s. 1, sub-s. 1 (a), is to be treated as being s. 1, sub-s. 1, of the Act of 1917. I have therefore to consider the effect of s. 1, sub-s. 1 (a), of the Act of 1919. That sub-section provides that where upon an application by any party to a contract made before January 1, 1917, the Court is satisfied that owing to the shortage of shipping occasioned by the war the contract cannot be enforced according to its terms without serious hardship, the Court may suspend or annul, or stay any proceedings for the enforcement of the contract, or any term thereof, or any rights arising thereunder. The defendants contended that this section does not apply to a case in which it is not necessary to take legal proceedings for the purpose of enforcing the contract, and suggested that the word "enforce" means "enforce by action." But I think that this would be too narrow an interpretation of the word. This section is to be treated as substituted for s. 1, sub-s. 1, of the Act of 1917. By sub-s. 3 of s. 1 of the Act of 1917, s. 1 of that Act is to be construed as one with the Courts (Emergency Powers) Act, 1914. By s. 1, sub-s. 1 (b), of the Act of 1914 it is prohibited, amongst other things, to "enforce the lapse of any policy of insurance to which the sub-section

PETERSON J. 1920
DIRECT U.S. CABLE Co.
v.
WESTERN UNION TELEGRAPH Co.

applies" without the leave of the Court. In this case it would plainly be unnecessary to have recourse to the Court in order to "enforce" the lapse of a policy of insurance. The word in this instance appears to be equivalent to "put in force," or "give effect to," and in my opinion the word "enforced" in s. 1, sub-s. 1 (a), of the Act of 1919 has a similar signification. The question remains, however, whether this contract cannot be carried out without serious hardship in consequence of "the shortage of shipping occasioned by the present war." These words did not appear in s. 1, sub-s. 1, of the Act of 1917, and were, no doubt, added in the Act of 1919 in consequence of the serious diminution of merchant shipping which had resulted from the unrestricted submarine campaign on the part of Germany. For the purposes of the present case the shortage of ordinary merchant shipping must be disregarded, as the only vessels to be considered in connection with the laying or repairing of cables are cable ships. Now there is no evidence that any cable ship was, during the war, either sunk, or diverted from its normal purpose. In the ordinary sense, then, it is not possible for me to hold that there was a shortage of cable ships occasioned by the war. It may be said that there were so many cables which required repair that there were not sufficient cable ships to attend to all of them adequately at the same time; and in this sense there was a shortage of cable ships. But neither the damage to the cables, nor the insufficiency of the proper vessels to attend to the repairs, was occasioned by the war. It was not proved, nor was there any attempt to prove, that if there had not been a war, the necessary repairs in 1918 would have been less, or the cable ships available would have been more, numerous. It was contended that there was a shortage of cable ships occasioned by the war, because the *Colonia* was used by the British Post Office in 1918 for the repair of some German cables of which the British Government had taken possession, and that but for the war the British Government would not have had these cables, and the *Colonia* would not have been required for their repair, and so would have been available

for other work. But for aught I know the *Colonia*, or one of the other available cable ships might, if there had been no war, been required for the repair of these cables. In any case this fact did not constitute a shortage of shipping occasioned by the war within the meaning of the section, any more than there would have been such a shortage if the British Government had during the war acquired some neutral cable, if there was one, and had used one of the available cable ships for its repair. In my opinion, then, the plaintiffs' claim to relief under s. 1, sub-s. 1 (a), of the Act of 1919 fails.

There is left the claim for relief under s. 1, sub-s. 2, of the Act of 1917, as amended by s. 1, sub-s. 1 (b), of the Act of 1919. Under this section the Court may give relief when it is satisfied that owing to any restriction or direction imposed or given by, or in pursuance of any enactment relating to the defence of the realm, or any regulation made thereunder, any term of a contract cannot be enforced without serious hardship. The facts on which the plaintiffs rely are the same as those which they urged in connection with the provisions of s. 2 of the Act of 1917. The defendants contended that the word "enforced" meant "enforced by legal proceedings," and had no application to the case of a lessee who exercises a power in the lease to put an end to the lease. For the reasons which I have given in the course of considering s. 1, sub-s. 1 (a), of the Act of 1919 I am not able to accept this view. The plaintiffs' argument was similar to that which they employed in connection with s. 2 of the Act of 1917, and in my opinion fails for the reasons which I have stated in connection with that section.

I have not dealt with various contentions of the defendants which, in the view which I have taken, it appeared to be unnecessary to consider.

In my opinion, for the reasons which I have stated, the plaintiffs' application fails.

Solicitors for the plaintiffs : *Slaughter & May.*

Solicitors for the defendants : *Budd, Johnson & Jecks.*

R. M.

PETERSON
J.
1920
DIRECT U.S.
CABLE Co.
v.
WESTERN
UNION
TELEGRAPH
Co.

EVE J.

1920

Dec. 1.

ANGLO-FRENCH MUSIC COMPANY, LIMITED *v.*
NICOLL.

[1920. A. 1851.]

Company—Memorandum—Construction—Preference and Ordinary Shareholders—Rights inter se—Surplus Assets in Event of Winding Up—Right to participate.

It was provided by clause 5 of the memorandum of association of a limited company, with a capital divided into ordinary and preference shares, that the preference shares should entitle the holders to a fixed cumulative dividend of 7 per cent. on the amount for the time being paid up thereon, and to the repayment of capital before any dividend was paid on capital repaid to the holders of the ordinary shares, and to a further dividend calculated as therein mentioned. The company had power to increase its capital and was desirous of doing so. Upon a summons by the company asking questions on the construction of clause 5 of the memorandum :—

Held, (1.) that upon the true construction of clause 5 the company could pay dividends on the ordinary share capital subject only to the fixed cumulative dividend at 7 per cent. on the preference shares and the further specified dividend ; (2.) that the preference shares entitled the holders thereof, in the event of a winding up of the company, to rank *pari passu* with the holders of ordinary shares in any surplus assets of the company.

In re Espuela Land and Cattle Co. [1909] 2 Ch. 187 and *In re Fraser and Chalmers, Ltd.* [1919] 2 Ch. 114 followed in preference to *In re National Telephone Co.* [1914] 1 Ch. 755.

ADJOURNED SUMMONS.

The plaintiff company was incorporated on August 11, 1916, under the Companies Acts, 1908 and 1913, with the object of carrying on business as vendors, publishers, proprietors, and printers of musical compositions of varied characters.

It was provided by clause 5 of the memorandum of association as follows : “ The capital of the company is 5000*l.* divided into 1000 Ordinary Shares of 1*l.* each, and 4000 Cumulative Preference Shares of 1*l.* each. The said preference shares shall entitle the holders thereof respectively to a fixed cumulative dividend at the rate of 7*l.* per cent. per annum on the amount for the time being paid up thereon, and to the repayment of capital before any dividend is paid or

capital is repaid to the holders of the said ordinary shares, and to a further dividend calculated at the rate of one-fourth of every one per cent. paid upon the ordinary shares in any one year over and above ten per cent. The company shall have power to increase its capital, and power from time to time to issue any shares in the original or new capital with any preference on priority or restricted rights in the payment of dividends or the distribution of assets or voting power or otherwise over or compared with any other share, whether ordinary or preference, and whether issued, or not."

By art. 27 of the articles of association it was provided as follows: "The company may in general meeting from time to time whether all the shares for the time being authorized shall have been issued or not, by special resolution increase the capital. And whenever the company shall increase the capital it may by resolution of one general meeting passed at the same time or at any subsequent time previous to the issue of the shares representing it attach to all or any of such shares any guarantee or preference or priority of payment of interest or dividend, or in the distribution of assets in the winding up, or both, and with a special or without any right of voting, or other rights or privileges, and of either a permanent, temporary, fixed, redeemable, fluctuating, certain, or contingent nature, as the company may think fit, provided always that no shares shall be issued to the prejudice of any previous issue of preference shares unless the right to do so has been expressly reserved in such previous issue, or unless a meeting constituted exclusively of the holders of such previous issue or a majority assent thereto."

The whole of the share capital as fixed by clause 5 had been paid up and the dividends on the preference shares paid down to December 31, 1919, but hitherto no dividends on the ordinary shares had been paid. The directors desired to increase the capital of the company by the issue of further preference and ordinary shares, and desired to ascertain the dividend and other rights of the shareholders inter se having regard to the terms of clause 5 of the memorandum.

By an originating summons taken out by the plaintiffs

EVE J.

1920

ANGLO-
FRENCH
MUSIC CO.

v.
NICOLL.

EVE J.
1920
ANGLO-
FRENCH
MUSIC Co.
v.
NICOLL.
—

the questions (inter alia) were asked (1.) whether, on the true construction of clause 5 of the memorandum of association of the plaintiff company, the holders of preference shares therein were entitled to repayment of the amount of their capital before any dividend was paid on the ordinary shares, or whether the company could declare and pay dividends on the ordinary share capital subject only to the payment of the fixed cumulative dividend at the rate of 7 per cent. per annum on its preference shares, and to provision being made for the further dividend on the preference shares at the rate of one-fourth of every 1 per cent. paid on the ordinary shares in any one year over and above 10 per cent. (3.) Whether, on the true construction of the memorandum, the said preference shares entitled the holders thereof to rank *pari passu* with the holders of the ordinary shares on a return of capital after the capital paid up on the ordinary shares had been returned to the holders thereof.

Other subsidiary questions arose which do not call for notice.

C. W. Turner for the company.

Roope Reeve for the preference shareholders on the first question. If taken literally as it stands clause 5 of the memorandum would appear to provide that neither dividend nor capital could be paid to ordinary shareholders until the preference shareholders have received their full dividend of 7 per cent. and also all their capital back. It is not what one would expect but the Court has to construe the contract, and if there is any ambiguity it will be construed in favour of the preference shareholders.

Sheldon for the ordinary shareholders was not called upon.

[EVE J. in answer to question (1.) made a declaration that the company could declare and pay dividends on its ordinary shares subject only to the payment of the fixed cumulative dividend of 7 per cent. on the preference shares, and also of the further dividend therein mentioned.]

The third question was then argued.

Roope Reeve for the preference shareholders. The

memorandum does not provide for the rights of the preference shareholders in the event of there being surplus assets or a winding up. The preference shareholders are entitled to participate in these surplus assets *pari passu* with the ordinary shareholders. There is a conflict between the authorities on this point. In *In re Espuela Land and Cattle Co.* (1) Swinfen Eady J. held that ultimate surplus assets in a winding up of a company should be distributed rateably between the preference and ordinary shareholders according to the nominal amount of their shares. On the other hand in *In re National Telephone Co.* (2) Sargant J. made some general observations which limited the rights of preference shareholders to those expressly given by the memorandum and articles and disentitled them to share in surplus assets. He held on the construction of the articles of association of that company that preference shareholders had been fully satisfied by the return of their paid-up capital and their dividend at a specified rate up to the winding up and that the deferred stockholders were entitled to the whole of the surplus assets. Then in *In re Fraser and Chalmers, Ld.* (3), Astbury J. followed *In re Espuela Land and Cattle Co.* (1) and did not follow the observations in *In re National Telephone Co.* (2) He held that a provision giving preference shareholders priority for repayment of capital in a winding up did not negative their ordinary right as corporators to share in surplus assets. These decisions are discussed in Stiebel's Company Law, 2nd ed., vol. i., pp. 375, 376, and in vol. ii., p. 1407. I adopt the comments on those decisions there given as part of my argument and suggest that the decisions and reasoning of Swinfen Eady J. and Astbury J. are right, and the general observations of Sargant J. on the question of surplus assets are not sound. The term "preference" is deceptive; it does not mean a preference in the distribution of the assets.

Sheldon for the ordinary shareholders. The real question is what was the bargain between the parties? Here the

EVE J.
1920
ANGLO-
FRENCH
MUSIC CO.
v.
NICOLL.
—

(1) [1909] 2 Ch. 187.

(2) [1914] 1 Ch. 755.

(3) [1919] 2 Ch. 114.

EVE J.
1920
ANGLO-
FRENCH
MUSIC CO.
v.
NICOLL.

bargain is to be found in the memorandum and articles ; but for the bargain the preference shareholder would have no preferential rights as to dividends or capital. All the dividend rights of the preference shareholder are strictly defined, and it must be the same as to capital. Where the bargain is silent he is not entitled to anything else, and in the present case gets nothing out of the surplus assets in the event of a winding up : *Will v. United Linkat Plantations Co.* (1)

EVE J. The question I have now to consider is whether the preference shareholders, in the event of the company being wound up and there being an excess of assets after the demands of the ordinary shareholders in respect of the amounts paid up on their shares have been satisfied, will be entitled to participate in that excess *pari passu* with the ordinary shareholders, or whether, after the return to them of their capital, they have no further interest in the surplus assets.

In order to ascertain the rights of the preference shareholders one must look at the bargain come to, as Farwell L.J. puts it, at the time of their birth. (2) This as a general rule is contained in the memorandum and articles in cases where the preference shares are part of the original capital ; in other cases it is to be found in the resolution authorizing the creation or issue of the shares. I do not think the terms of the bargain, so far as they relate to the interest of the preference shareholders in the surplus assets on a winding up are in any way connected with, or controlled by the terms relating to the division of profits or the payment of dividends by the company as a going concern. These latter only operate so long as the company is in fact a going concern. On the other hand, the provisions as to the return of capital and the ultimate distribution of any surplus assets only become material when the company has ceased to exist except for the purpose of liquidation, and when that process has reached the stage whereat the remaining assets belong to the

(1) [1912] 2 Ch. 571.

(2) [1912] 2 Ch. 579.

contributories alone. At that moment of time there are two possible alternatives, the one that those remaining assets are insufficient for repayment of their capital to the shareholders, the other that they are more than sufficient for repayment of the capital. In either alternative, in the absence of a special bargain the preference shareholder has no preferential right to a return of his capital. If the assets are insufficient to repay all the paid-up capital, they must be distributed so as to throw the loss on the members in proportion to the nominal amount of the capital held by them ; if, on the other hand, they exceed the amount of the paid-up capital the excess must be distributed among the members in proportion to the nominal amount of the capital held by them. In the bargain which I have to construe in this case, 'and which is contained in the company's memorandum of association, the first of these alternatives is alone expressly dealt with, and the point I have to consider is this : does the provision in the bargain providing for what is to happen in the event of the assets being insufficient to repay all the capital operate to preclude the preference shareholders, in the event of the assets being more than sufficient to repay all the capital, from participating in the excess ? I see no reason why it should do. I do not think it is accurate to say that the whole bargain between the two classes of shareholders is to be found in the memorandum, except to this extent, that the rights of each class are thereby finally determined in respect of all matters expressly or by necessary implication therein dealt with.

In the present case the respective rights of the two classes to the profits of the company are expressly dealt with—so also are the rights in the event of an insufficiency of assets to repay all the capital in a winding up—but I cannot see anything which deals either expressly or by necessary implication with the rights of either class in the event of the assets being more than sufficient to repay the capital.

On these grounds I prefer the reasoning by which the decisions of Swinfen Eady J. (as he then was) and Astbury J. are supported to some of the observations in the case of

EVE J.
1920
ANGLO-
FRENCH
MUSIC Co.
v.
NICOLL.
—

EVE J. *In re National Telephone Co.* (1) I am not suggesting for a moment that this last-mentioned case was not rightly decided, 1920 I am only venturing to dissent from such of the observations ANGLO-FRENCH MUSIC CO. to be found in the report as are in the nature of criticisms v. on the earlier decision of Swinfen Eady J. The result is NICOLL. that I hold there is nothing in the bargain here to preclude the preference shareholder, in the event of the company being wound up and of there being surplus assets after repayment of all the paid-up capital, from participating with the ordinary shareholder in the distribution of such surplus.

Solicitors for all parties : *T. Richards & Co.*

G. M.

PETERSON
J.

1920

Oct. 19, 27.

JENKIN v. PHARMACEUTICAL SOCIETY OF GREAT BRITAIN.

[1920. J. 722.]

Corporation—Royal Charter—Confirmation by Statute—Proposed industrial Council and Trade Regulations—Ultra vires—Injunction—Power of Member to obtain—Pharmacy Act, 1852 (15 & 16 Vict. c. 56).

A member of a society incorporated by Royal Charter is entitled to ask for an injunction to restrain the commission by the society of acts which are outside of the scope of the charter and which may result in the forfeiture of the charter and the destruction of the society.

Ward v. Society of Attornies (1844) 1 Coll. 370 ; *Breay v. Royal British Nurses' Association* [1897] 2 Ch. 272 ; and *Rendall v. Crystal Palace Co.* (1858) 4 K. & J. 326 applied.

The defendant society was incorporated by Royal Charter in 1843 for the purpose of advancing chemistry and pharmacy and promoting a uniform system of education of those who should practise the same, and also for the protection of those who carried on the business of chemists and druggists. The charter was subsequently confirmed by the Pharmacy Act, 1852:—

Held, that (1.) The regulation of (a) the hours of business of members, (b) the wages and conditions of employment between master and employee members of the society, (c) the prices at which members might sell their goods ; and

(2.) The expenditure of the funds of the society in the formation of an industrial council committee for (amongst others) the

(1) [1914] 1 Ch. 755.

above-named objects, all of which would in effect convert the society into a Trade Union, a result which could not have been contemplated in 1843 when the charter was granted; and

(3.) The insurance of members generally against insurable risks, were not within the powers or purposes of the society, and that the plaintiff, a registered member of the society, was entitled to an injunction to restrain the society from committing such acts.

PETERSON
J.

1920
JENKIN
v.
PHARMA-
CEUTICAL
SOCIETY
OF
GREAT
BRITAIN.

WITNESS ACTION.

The defendant society was incorporated by Royal Charter on February 18, 1843, for the purpose of advancing chemistry and pharmacy and promoting a uniform system of education of those who should practise the same and also for the protection of those who carried on the business of chemists and druggists and also for providing a fund for the relief of the distressed members and associates of the society and of their widows and orphans. The charter after providing for a common seal and a power to buy and hold real and personal property declared that the members of the society should be chemists and druggists who were or had been established on their own account or who should have been examined and certified as qualified for admission or elected as superintendent by the council as therein mentioned, and that assistants to chemists and druggists and apprentices or students in pharmacy after being duly examined and certified to be qualified for admission should be admitted as associates. After provision for general meetings and the appointment of officers of the society and a council for examination and the creation of a benevolent fund, the council was empowered to make byelaws for regulating the society's affairs, the number of its officers, the manner of examination, the removal and election of members and associates and officers and servants, the qualification of members, associates and apprentices and the amount of relief to be granted from the benevolent fund.

In 1852 the Pharmacy Act provided for the appointment of a registrar whose duty it was to keep a register of members, associates, apprentices, and students, for the conduct of examination and the grant of certificates of competent skill and knowledge, and prohibited persons not duly registered as pharmaceutical chemists from using the title of Pharmaceutical

PETERSON Chemists. By s. 1 it was enacted that the charter of 1843, except such parts as were by the Act varied or repealed, was "confirmed and declared to be in full force and virtue," and that it should be as good and effectual to all intents and purposes as if that Act had not been passed ; and s. 2 provided that the council of the society might make and establish byelaws for the purpose contemplated by the said charter or by that Act.

J.
1920
JENKIN
v.
PHARMA-
CEUTICAL
SOCIETY
OF
GREAT
BRITAIN.

The society had recently taken part in promoting an industrial council committee for the drug trade or industry and had already applied part of its funds in promoting that committee and proposed to expend further funds in the establishment and working of the committee. The objects of the committee, so far as they had been formulated previously to the issue of the writ in this action, were stated in para. 6 of the statement of claim therein to include (inter alia) the regulation of wages, hours and working conditions in the drug industry ; the regulation of production and employment in that industry ; the securing the settlement of disputes between different parties in that industry ; the adoption of measures for securing the inclusion of all employers and employees in their respective organizations, the collection of statistics and information on matters appertaining to the said industry, the improvement of health conditions, and the provision of special treatment where necessary for workers, in the said industry.

Apart altogether from the formation of the industrial council committee for the purposes and objects above mentioned, the defendant society also proposed to undertake the various functions set out in para. 7 of the statement of claim as follows :—

- "(A) To regulate the hours of business of members of the defendant Society.
- (B) To regulate the wages and conditions of employment as between masters and their employees who are members of the defendant Society.
- (C) To regulate the prices at which members shall sell their goods.

- (D) To exercise the functions of an employers' association. PETERSON
J.
1920
JENKIN
v.
PHARMA-
CEUTICAL
SOCIETY
OF
GREAT
BRITAIN.
- (E) To insure and to effect insurance of members of the Society against errors, neglect and misconduct of employees and against fire, burglary, damage to plate glass and generally against insurable risks.
- (F) To audit accounts, collect debts and take stock for its members.
- (G) To provide and maintain an employment register and a register of unsatisfactory employees.
- (H) To provide and supply information as to the commercial standing of persons and firms with whom members of the Society wish to transact business.
- (I) To provide legal advice to members."

The plaintiff, who was a member of the defendant society, and of the council of the society, and had also contributed to the funds of the society the annual subscriptions due by him as a member, commenced this action for a declaration that the matters or things referred to in paras. 6 and 7 of the statement of claim were *ultra vires*, and for an injunction.

The defendant society admitted paras. 6 and 7 of the statement of claim, but pleaded that the objects, matters and things therein mentioned were *intra vires*.

Sir A. H. Richardson (J. B. Matthews K.C. with him) for the plaintiff. The powers of the society must be limited to such matters and things as are necessary to enable it to discharge the duties for which it was incorporated in 1843, they must be construed in light of the objects of that incorporation, and must be exercised for all classes of members and not for any particular class. It is not competent to a society incorporated by Royal Charter in 1843 to add to its objects something so wholly distinct from the objects contemplated by its charter as these objects now in question, many of which would have been illegal in 1843, for instance, a combination to keep up prices or the formation of a masters' association. Objects not then recognized as legal cannot come within the scope of the charter, nor can objects which are for the benefit of a particular class

PETERSON of members only, and not of the whole body: *Osborne v. J. Amalgamated Society of Railway Servants* (1); *Reg. v. Reed*. (2) Courts of equity will restrain incorporated bodies within the limits of their institution: Grant on Corporations, p. 293; and an action for an injunction having that object will lie at the suit of one of the members against the body: *Ward v. Society of Attornies* (3); *Rendall v. Crystal Palace Co.* (4) and *Breay v. Royal British Nurses' Association* (5); in none of which cases was there any suggestion that such an action would not lie.

Macmorran K.C. and *Slessor* for the defendant society. One of the main objects of the society is the protection of those who carry on the business of chemists and druggists, and that of itself is a much smaller class than the whole of the members. Protection is also given to those wishing to enter the business, again a smaller class. The society's powers can therefore be exercised for the benefit of a particular class of members, and need not be exercised for the benefit of the whole of the members. There is nothing in the proposed functions which is beyond the powers of those who have undertaken the protection of those who carry on business. Those who are merely employees do not "carry on the business of chemists and druggists": *Sangster v. Kay*. (6)

Assuming, however, that some of these functions are not warranted, the plaintiff has no legal remedy and cannot maintain this action. The proposed acts are not illegal. A corporation at common law can do what it pleases, and even if the acts are wrong, it is not open to the plaintiff to say they are ultra vires. The only remedy would be scire facias for revocation of the Charter: *British South Africa Co. v. De Beers Consolidated Mines* (7) where Swinfen Eady J. dealt with *Ward v. Society of Attornies* (3); *Riche v. Ashbury Railway Carriage and Iron Co.* (8)

[PETERSON J. But a corporator stands on a different

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| (1) [1909] 1 Ch. 163; | (4) 4 K. & J. 326. |
| A. C. 87. | (5) [1897] 2 Ch. 272. |
| (2) (1880) 5 Q. B. D. 483. | (6) (1850) 5 Ex. 386. |
| (3) 1 Coll. 370. | (7) [1910] 1 Ch. 354. |
| (8) (1874) L. R. 9 Ex. 224. | |

footing. Those were cases of actions by persons not PETERSON J.
corporators.]

Rendall v. Crystal Palace Co. (1) turned upon the consideration of a particular Act of Parliament and *Osborne's Case* (2) turned on the powers of a statutory corporation, and the distinction between a statutory corporation and a corporation incorporated by Royal Charter was clearly stated by Farwell J. in *Attorney-General v. Manchester Corporation*. (3)

We submit that the acts complained of are not ultra vires, and that if they are there is no case which shows that the plaintiff has the remedy which he seeks.

J. B. Matthews K.C. in reply. The jurisdiction to restrain the misuse of the funds of a corporation is not confined to or based upon the statutory nature of the corporation: *Pickering v. Stephenson* (4); Lindley on Companies, 6th ed., pp. 137, 445.

[He also referred to Dunning's argument in *Hoblyn v. The King* (5) and to the article on Corporations in 26 Law Quarterly Review, p. 320.]

Vanneck held a watching brief on behalf of the Scottish Pharmaceutical Federation.

Cur. adv. vult.

Oct. 27. PETERSON J. stated the facts and continued: The plaintiff, who is a member of the society and also a member of the council, contends that the operations mentioned in paras. 6 and 7 of the statement of claim are beyond the powers of the society and has commenced this action for the purpose of testing the question whether the functions and powers which the society proposes to exercise are within the scope of its powers.

The society contends that the various matters referred to in paras. 6 and 7 of the statement of claim are within the powers conferred by the charter; and that, if they are not, the doctrine of ultra vires does not apply to a corporation which has been established by Royal Charter.

(1) 4 K. & J. 326.

(2) [1909] 1 Ch. 163; [1910]

A. C. 87.

(3) [1906] 1 Ch. 643, 651.

(4) (1872) L. R. 14 Eq. 322.

(5) (1772) 2 Bro. P. C. 329, 335.

PETERSON
J.

1920

JENKIN
v.

PHARMA-
CEUTICAL
SOCIETY
OF
GREAT
BRITAIN.

The first question with which I propose to deal is the question whether a chartered Society can be restrained from doing acts which are prohibited or not expressly or impliedly authorized by its charter. There is no doubt that companies incorporated by statute for special purposes, and societies, whether incorporated or not, which owe their constitution and status to an Act of Parliament, having their objects and powers defined thereby, cannot apply their funds to any purposes foreign to the purposes for which they were established, or embark on any undertaking in which they were not intended by Parliament to be concerned: see Lord Macnaghten in *Amalgamated Society of Railway Servants v. Osborne*. (1) Corporations which are constituted by Royal Charter and do not depend for their constitution and status on an Act of Parliament stand on a somewhat different footing. A corporation created by charter can at common law do with its property all such acts as an ordinary person can do and bind itself to such contracts as an ordinary person can bind himself to, and even if the charter expressly prohibits a particular act the corporation can at common law do the act: see *Riche v. Ashbury Railway Carriage and Iron Co.* (2); *Baroness Wenlock v. River Dee Co.* (3); and *British South Africa Co. v. De Beers Consolidated Mines.* (4) But if the corporation does that which is prohibited or is not authorized by its charter its charter may be recalled by the Crown by proceedings on a scire facias. Although there is this difference between a statutory company and an association incorporated by charter it does not follow that a member of a chartered society cannot take legal proceedings for the purpose of preventing the society or its governing body from doing acts outside of the purposes authorized by the charter which may lead to the destruction of the corporation by the forfeiture of its charter. The members join the corporation on the footing that its purposes are those authorized by the charter and that the corporation will not act in such a way as to destroy itself and the rights of the corporators by doing that which is not authorized by the charter. Thus

(1) [1910] A. C. 87.

(2) L. R. 9 Ex. 224, 263.

(3) (1887) 36 Ch. D. 674.

(4) [1910] 1 Ch. 354, 374.

Lord Lindley in his book on Companies, 6th ed., vol. i., p. 137, says that the charter of a company is a law set to it and to the individuals composing it, and they have no power by any agreement among themselves to annul or legally do anything at variance with their charter. In support of this proposition *Society of Practical Knowledge v. Abbott* (1) is cited; and from the report of that case it seems clear that the Master of the Rolls thought that the members of a chartered society could not proceed to destroy the society or act in a manner inconsistent with the charter.

Counsel for the plaintiffs referred to three cases. The first was *Ward v. Society of Attornies*. (2) In that case the plaintiff representing a minority of the members of the society objected to the proposal of the majority to surrender the society's charter in exchange for the grant of a new charter. The Vice-Chancellor granted an interlocutory injunction so as to prevent what he described as the destruction of the corporation before the rights of the parties had been decided at the trial. But the last paragraph of his judgment indicates clearly that the learned Vice-Chancellor had not arrived at any definite conclusion that the plaintiff was right in law; and it may be a very questionable proposition that a corporation created by charter can be prevented from seeking to obtain a new and enlarged charter: see the observations in Lindley on Companies, 6th ed., vol. i., p. 445. That case does not seem to me to be of much assistance in determining the question in the present case.

In *Breay v. Royal British Nurses' Association* (3) North J. granted an interlocutory injunction restraining the association and its officers and servants from expending the funds of the association in defending an action for libel brought against the honorary editor of a newspaper of which the association was the proprietor and publisher. In the Court of Appeal the Lords Justices came to the conclusion that the act in question was within the powers conferred on the association by its charter and dissolved the injunction. North J. must

(1) (1840) 2 Beav. 559, 568.

(2) 1 Coll. 370.

(3) [1897] 2 Ch. 272.

PETERSON J.
1920
JENKIN v.
PHARMA-
CEUTICAL
SOCIETY
OF
GREAT
BRITAIN.

have proceeded on the ground that the expenditure of the funds of the association was outside of the powers conferred by the charter, and it does not appear to have been suggested before the Court of Appeal that, if the expenditure was not authorized by the charter, a member of the association could not prevent the association from acting in breach of the provisions of the charter. In *Rendall v. Crystal Palace Co.* (1) the Company proposed to do something which Sir William Page Wood V.-C. held would be contrary to the provisions of its charter. The defendants who were the company and its directors demurred to the bill. The learned Vice-Chancellor held that the act contemplated by the company would place the charter in such peril as entitled any shareholder to invoke the assistance of the Court, and he accordingly overruled the demurrer and granted an injunction restraining the defendants from doing the acts which were impugned.

In my opinion the authorities justify me in holding that if the society in the present case intends to do acts which are not authorized by its charter, a member is entitled to ask for an injunction restraining the commission of acts which are outside of the scope of the charter and which may result in the forfeiture of the charter and the destruction of the society. It is also to be observed that s. 1 of the Pharmacy Act, 1852, confirmed the charter, and that s. 2, which authorized the council to make bye-laws for the purposes contemplated by the charter or the Act recognized that the only purposes of the Society were those which were contemplated either by the charter or by the Act; and I am of opinion that this amounts to a statutory limitation of the objects of the society.

It therefore becomes necessary to scrutinise the acts or proposals of the society which are attacked with the object of ascertaining whether they can fairly be said to come within the authorized purposes of the society. No serious objection was taken to the matters referred to in clauses (F), (H), and (I) of para. 7 of the statement of claim, and I, therefore, do not deal with this portion of the case in detail. As to (G) it was not contended that the provision of an employment register was

(1) 4 K. & J. 326.

outside of the powers of the society, but it was said the main-
 tenance of a register of unsatisfactory employees was in the
 interests of the employers and was or might be contrary to
 the interests of such of the members as were employees and
 that it was therefore not a provision for the benefit of the
 members as a whole. But I am not satisfied that the elimina-
 tion of unsatisfactory employees may not be to the interests
 of satisfactory employees. In any case the argument fails
 to recognize that if the provision is for the protection of those
 who carry on the business of chemists and druggists it comes
 within the authorized purposes of the society, and that the
 protection of employees in such a business does not come
 within this purpose. In my opinion there is no valid objection
 to the matters referred to in para. 7 (G).

Clause (E) of para. 7 is in my view on a very different footing.
 The society proposes to insure members against negligence
 or misconduct of their employees, fire, burglary, damage to
 plate glass and generally against insurable risks. This would
 enable the society to carry on an insurance business of any
 kind, limited only by the fact that the assured must be a
 member of the society. Is this a measure for the protection
 of those who carry on the business of chemists and druggists
 within the meaning of the charter? In my opinion the
 protection referred to in the charter is the protection of the
 interests of those who carry on the business as a whole and
 not the protection of the interests of an individual or indi-
 viduals. Thus the promotion of the Act of 1852 was a measure
 for the protection of those who carried on the business, but in
 my view the application of the funds of the society in paying
 the trade or other debts of a man who carried on such a business,
 even if it saved him from bankruptcy, would not be a measure
 for the protection of those who carried on the business of
 chemists and druggists.

Some kind of insurance might in a sense be a protection of
 the insured—e.g., insurance against misconduct of employees,
 fire, burglary and damage to plate glass would be a protection
 against loss—while life insurance could not properly be described
 as protection of the insured in any sense; but the insurance

PETERSON
 J.
 1920
 JENKIN
 v.
 PHARMA-
 CEUTICAL
 SOCIETY
 OF
 GREAT
 BRITAIN.

PETERSON J.
1920
JENKIN v.
PHARMA-
CEUTICAL
SOCIETY
OF
GREAT
BRITAIN.

of the individual against loss is not in my opinion a means of protecting those who carry on the business of chemists and druggists within the meaning of the charter. In my judgment the carrying on of an insurance business does not come within any of the purposes of the charter and was not contemplated by any person as a possible object of the society at the time when the charter was granted. It is to be observed that if insurance could properly be described as a measure for the protection of members, the protection mentioned in the charter is only the protection of those who carry on the business of chemists and druggists while the society proposes to undertake the insurance of any members.

The proposals in para. 7 (A), (B), and (C) are also in my opinion open to objection. The society proposes to regulate the hours of business of members, to regulate, as between masters and employee members of the society, wages and conditions of employment and to regulate the prices at which members may sell their goods. The society would, if its intention were effected, become a combination for regulating the relations between workman and master and between master and masters and for imposing restrictive conditions on the conduct of the trade or business of chemists and druggists and would convert itself into a trade union within the definition of s. 16 of the Trade Unions Act, 1876. In a sense these objects or some of them may be said to be for the protection of the members who carry on business, but the word "protection" is a word of indefinite meaning, and in construing the charter a reasonable meaning must be given to it. I find it impossible to suppose that when a charter of 1843 incorporating such a society as the defendants' for the purpose of advancing pharmacy, promoting education and providing a benevolent fund also enabled it to protect members who carried on the business of chemists and druggists, it was contemplated that the society might convert itself into a trade union or that it was intended to legalise by Royal Charter a combination in restraint of trade. In my opinion the acts referred to in para. 7 (A), (B) and (C) of the statement of claim are not within the purposes authorized by the charter. I feel a difficulty

in dealing with the proposal referred to in para. 7 (D), as I have no evidence on the question what are the acts intended to be included in the words "the functions of an employers' association." If these words include or are merely a summary of the functions referred to in (A), (B) and (C) the proposal is open to the objection which I have pointed out in the case of those clauses. Subject to this intimation I am not in a position to express an opinion on this proposal.

The complaint in respect of para. 6 of the statement of claim is that the society has taken part in forming an industrial council committee some of whose objects are alleged to be outside of the powers of the society and that it is expending part of its funds in the promotion, establishment and work of the committee. If the society cannot itself use its funds for the purposes in question it cannot hand over its funds to another body for the purposes of doing that which it cannot itself do. Now some of the objects of the committee are the regulation of wages, hours, and working conditions and the regulation of production and employment in the drug industry. These objects, so far as the society is concerned, are open to the objection to the proposals in para. 7 (A), (B) and (C) and consequently the society is not, in my opinion, justified in expending any part of its funds in the formation or work of such a body. This objection is sufficient for the purpose of determining the question whether the action of the society in connection with the committee is justified, and it is unnecessary to consider the remaining objects of the committee, some of which may be innocuous—for instance, the settlement of disputes, which was not attacked, and the collection of statistics and information on matters appertaining to the industry which may fairly be said to be for the protection of those who carry on the business within the meaning of the charter.

There will therefore be a declaration that it is not within the powers or purposes of the society to take part or expend any of its funds in the formation, establishment, maintenance or work of the committee referred to in para. 6 of the statement of claim, or to undertake or perform any of the

PETERSON
J.

1920

JENKIN

v.

PHARMA-
CEUTICAL
SOCIETY
OF
GREAT
BRITAIN.

PETERSON matters or things mentioned in para. 7 (A), (B), (C) and (E);
 J. and there will be an injunction corresponding with the
 1920 declaration.

JENKIN

v.

PHARMA-
CEUTICAL
SOCIETY
OF
GREAT
BRITAIN.

Solicitors for the plaintiff: *Neve, Beck, & Kirby.*

Solicitors for the defendants: *Thompsons, Quarrell & Jones.*

Solicitors for the Scottish Pharmaceutical Federation:
Greenfield & Cracknall.

R. M.

PETERSON
J.

NEVILE v. HARDY.

1920

[1920. N. 56.]

Nov. 12, 15.

*Emergency Legislation—Landlord and Tenant—Recovery of Possession—
 “Reasonably required” as a Residence for Landlord—Required at Trial
 of Action—Available alternative Accommodation—Onus of Proof—
 Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11
 Geo. 5, c. 17), s. 5, sub-s. 1 (b) (d).*

In an action for recovery of possession of a dwelling house to which the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, applies, on the ground that the dwelling house is reasonably required by the landlord as a residence for himself, the Court must be satisfied at the hearing of the action that the dwelling house is then reasonably required for that purpose. But the fact that the landlord owing to the refusal of the tenant to give possession has had to obtain other premises where he is temporarily residing at the time of the hearing of the action, is no reason for holding that the dwelling house is not then reasonably required by the landlord as a residence for himself.

Under s. 5, sub-s. 1 (d), of the Act, the onus is upon the landlord seeking possession to satisfy the Court by positive evidence at the hearing of the action that “alternative accommodation, reasonably equivalent as regards rent and suitability in all respects,” is then available.

WITNESS ACTION.

By an agreement in writing dated July 13, 1907, the defendant agreed to take and the landlord, W. T. Vaughan, agreed to let at the yearly rent of 50*l.* the second and third floors and the coal cellar in the basement of a house, No. 112 Knightsbridge, in the County of Middlesex (of which the landlord was

lessee), from September 29, 1907, on a yearly tenancy terminable at any 29th day of September by notice to be given by the landlord on or before the preceding 24th day of June.

On June 23, 1919, the landlord gave the defendant notice to determine the tenancy on September 29, 1919.

By a lease dated September 12, 1919, W. T. Vaughan demised the whole of the premises, No. 112 Knightsbridge, to the plaintiff for a term of seven years from September 29, 1919, at a yearly rent of 350*l*. The lease was granted on the understanding that the plaintiff should have immediate possession of the whole of the said premises which were required by her for business and residential purposes. The plaintiff entered into possession of the basements, ground and first floors of the premises, but the defendant refused to quit the second and third floors, which the plaintiff required for the residence of herself and some of her staff, and the defendant had remained there ever since and had sublet the second floor to a tenant who was carrying on a hairdresser's business in the same, and who without the consent of the plaintiff had adapted one of the rooms for the purposes of such business. The defendant herself was not occupying more than two rooms.

The plaintiff was carrying on the business of a milliner and dealer in antiques on the ground floor, and of a tea shop on the first floor, and being unable to obtain possession from the defendant of the second and third floors the plaintiff had been compelled to obtain residential accommodation for herself elsewhere.

During the progress of structural alterations carried out by the plaintiff on the ground floor for the purpose of adapting them as her business premises, the defendant, after the issue of the writ in this action, interfered with the new structure that was being erected and the plaintiff commenced another action against her [1920. N. No. 109] for an injunction to restrain her from damaging the premises. Upon motion for an interim injunction the defendant gave an undertaking and the motion was ordered to stand over until the trial, and that and the present action were subsequently consolidated.

The plaintiff now claimed (*inter alia*) possession of the parts

PETERSON
J.
1920
NEVILLE
v.
HARDY.

PETERSON of the premises in the occupation of the defendant, alleging
 J.
 1920
 NEVILLE
 v.
 HARDY.
 ———
 that the alteration on the second floor by the defendant's tenant amounted to acts of waste ; that the conduct of the defendant during the structural alterations was a nuisance or annoyance to adjoining occupiers ; and that the premises were reasonably required by the plaintiff for occupation as a residence for herself. The other claims in the consolidated action do not call for a report.

The effect of the evidence given at the trial with respect to available alternative accommodation appears from his Lordship's judgment.

C. Doughty for the plaintiff. The evidence shows that there were both annoyance and waste within the meaning of s. 5, sub-s. 1 (b), of the Act of 1920. The alteration of the rooms for the purposes of a hairdresser's business deteriorated them for residential purposes. The plaintiff reasonably required the upper floors for her own residential purposes, for it would have been a great advantage to her to reside on her own business premises, and the "reasonableness" is the test: *Epsom Grand Stand Association v. Clarke*. (1) The Act only intends to restrain capriciousness on the part of the landlord in requiring possession.

Under the earlier Act the onus was on the tenant to satisfy the Court that no alternative accommodation was available: *Bazalgette v. Hampson* (2), and if the Act of 1920 puts that onus on the landlord I submit that the evidence shows that the plaintiff discharged it by referring the defendant to the house agents, and to the two rooms in George Street which were then available, and were equivalent accommodation, for the defendant had, after notice to quit, sublet her second floor. It cannot be that the plaintiff has to show that alternative accommodation is available on the very day on which the order for possession is made.

Schultess-Young and *H. C. Bickmore* for the defendant. The Act of 1920 protects both tenants and sub-tenants, and *Artisans, Labourers and General Dwellings Co. v.*

(1) [1919] W. N. 170.

(2) (1920) 36 Times L. R. 240.

Whitaker (1) shows how strongly these Acts protect tenants even against themselves. We submit that the evidence does not prove any nuisance or annoyance to adjoining occupiers or any deterioration of the premises from acts of waste. The alleged alternative accommodation was not reasonably equivalent as regards suitability in any respect, and the defendant is entitled to the protection of s. 5, sub-s. 1 (*d*). The defendant and her sub-tenant are statutory tenants under the Act, but they have been treated by the plaintiff as trespassers.

PETERSON
J.
1920
NEVILLE
v.
HARDY.

PETERSON J. [after reviewing the evidence came to the conclusion that the defendant had not been guilty of conduct which was a nuisance or annoyance to adjoining occupiers within the meaning of clause (*b*) of sub-s. 1 of s. 5 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 ; and further, that in the entire absence of evidence that the condition of the dwelling house had deteriorated owing to acts of waste by the defendant or any person residing with her he could not hold that the state of affairs existed which would entitle the plaintiff to rely upon the provisions of the last part of clause (*b*) of s. 5, sub-s. 1. His Lordship then continued :] That leaves clause (*d*) of sub-s. 1 of s. 5, which supplies the plaintiff with an alternative claim, and enables an order or judgment for the recovery of possession of any dwelling house to which the Act applies to be made where “ the dwelling house is reasonably required by the landlord for occupation as a residence for himself, or for any person bona fide residing or to reside with him, or for some person in his whole-time employment . . . and the Court is satisfied that alternative accommodation, reasonably equivalent as regards rent and suitability in all respects, is available.” The first point which arises is on the question whether the dwelling house is reasonably required. So far as it is necessary for me so to hold, I think that the dwelling house must be reasonably required when the order for the recovery of possession is asked for—namely, at the hearing—and that then the judge must be satisfied that the dwelling house is reasonably required by the landlord

(1) [1919] 2 K. B. 301.

PETERSON J. 1920
NEVILLE
v.
HARDY.

for occupation as a residence for himself or for the other persons specified in clause (d). In the present case the plaintiff desired the upper floors as a residence for herself, but finding that she could not get them she has taken other premises for her residence, but I do not think that the fact that she is at present living elsewhere is any reason for holding that the dwelling house is not reasonably required by her as a residence for herself or for persons in her whole-time employment. The evidence is that if she could obtain possession of these upper floors she would use them for the occupation of herself and her staff, and in those circumstances I cannot say that they are not reasonably required by her. The defendant therefore cannot rely on the earlier part of clause (d).

But the conditions of the latter part of the clause must also be satisfied by the landlord before he can obtain an order for possession, and under them the Court must be "satisfied that alternative accommodation, reasonably equivalent as regards rent and suitability in all respects, is available." It was contended that under this provision the onus is thrown upon the defendant, the lessee. But that would mean that the lessee had to satisfy the Court "that alternative accommodation, reasonably equivalent as regards rent and suitability in all respects, is *not* available." Those, however, are not the words of the clause; the words are "that alternative accommodation" of the kind specified "*is* available." In my opinion, therefore, it is for the landlord who seeks possession to satisfy the Court by positive evidence that alternative accommodation of the kind specified is available. What evidence to that effect have I in the present case? It is said that the plaintiff told the defendant that certain house agents, Messrs. King & King, could tell her of other accommodation. But the defendant did not go to them, and I have no evidence whatever as to the alternative accommodation which Messrs. King & King had to offer. I have the evidence of the defendant that she was in communication with other house agents about other premises but without success. The only evidence which the plaintiff has supplied is that there was a

basement in George Street, Baker Street, which was available. PETERSON
J.
1920
NEVILLE
v.
HARDY.
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This basement consisted of two dark and dirty rooms which had been used as storerooms. It is idle to suggest that a basement such as that which I have heard described could by any stretch of imagination be considered to be "reasonably equivalent as regards rent and suitability in all respects" to the premises of which possession is sought. In the one case there are the second and third floors of a house in Knightsbridge with plenty of light, whereas in the other case there are two dark and dirty rooms in a basement in George Street. I decline to accept the view that this basement is equivalent in any way whatever to the premises occupied at the present time by the defendant. However, it appears that in fact these two rooms are not now available, as the owner or tenant of them proposes to use them for the purposes of his business and is not now proposing to let them. The result is that so far as the claim for possession goes, the action fails.

Solicitors for the plaintiff: *G. F. Hudson, Matthews & Co.*

Solicitor for the defendant: *W. J. Tabrum.*

R. M.

In re FRIEND OF THE CLERGY'S CHARTERS.

ASTBURY
J.

FRIEND OF THE CLERGY *v.* ATTORNEY-GENERAL.

1920
Dec. 17, 20.

[1920. C. 1625.]

Charity of 1849—Charters of 1854 and 1873—Scope—"Clergymen of the established church of England and Ireland"—Disestablishment of Irish and Welsh Churches—Cure outside England—Ireland—Wales—Scotland—British Dominions—Irish Church Act, 1869 (32 & 33 Vict. c. 42), s. 69—Welsh Church Act, 1914 (4 & 5 Geo. 5, c. 91), s. 2, sub-s. 4—Welsh Church (Temporalities) Act, 1919 (9 & 10 Geo. 5, c. 65), s. 7, sub-s. 2.

In 1854 a society, formed in 1849 and called the Friend of the Clergy, obtained a charter of incorporation. Its defined object was to provide permanent pensions for the widows and orphan unmarried daughters of "clergymen of the established church of England and Ireland" and to afford temporary assistance to necessitous "clergymen of such church" and their families.

ASTBURY
J.

1920

FRIEND
OF THE
CLERGY'S
CHARTERS,
In re.

FRIEND
OF THE
CLERGY
v.

ATTORNEY-
GENERAL.

On January 1, 1871, the Irish church was disestablished by the Irish Church Act, 1869.

On July 2, 1873, the original charter was confirmed with immaterial amendments.

On March 31, 1920, the Welsh church was disestablished by the Welsh Church Acts, 1914 and 1919 :—

Held, that clergymen ordained to the ministry of the established church of England retained their status while holding a consistent cure in the disestablished churches of Wales or Ireland, or in the episcopal church of Scotland, or in the British dominions, and that they and their families were within the scope of the charter.

Held, also, that in the case of Wales this principle was supported by the Welsh Church (Temporalities) Act, 1919, s. 7, sub-s. 2, and was not inconsistent with the Welsh Church Act, 1914, s. 2, sub-s. 4.

Held, also, that pre-disestablishment Welsh pensions might be continued.

Held, also, that having regard to the Irish Church Act, 1869, s. 69, and the fact that the original charter was confirmed after the disestablishment effected by that Act, clergymen ordained to the ministry of the disestablished church of Ireland and their families were within the scope of the charter.

Whether clergymen ordained to the ministry of the disestablished Welsh church, or of the episcopal church of Scotland, or of the established Church of England exclusively for service in the dominions, or of a dominion church, and not licensed to officiate in England, were within the scope of the charter, *quaere*.

ORIGINATING SUMMONS.

By a charter of incorporation dated January 26, 1854, a society called "The Friend of the Clergy" formed in 1849 "for the purpose of providing permanent pensions for the widows and orphan unmarried daughters of clergymen of the established church of England and Ireland, and for the purpose of affording temporary assistance to necessitous clergymen of such church and their families" with rules enrolled in Chancery on July 30, 1852, was constituted a body corporate by the name of "The Friend of the Clergy" for the purposes aforesaid with perpetual succession and a common seal. It was provided that before any person should be entitled to act as president, vice-president, treasurer, committee-man, or auditor, he should sign a declaration that he was a member of the united church of England and Ireland. The charter was to be recognized by the Courts in Great Britain and Ireland or elsewhere and to be taken construed and adjudged in the most favourable and beneficial

sense and for the best advantage of the society, as well in the Courts of Record in Great Britain and Ireland as elsewhere ; notwithstanding any non-recital, mis-recital, uncertainty, or imperfection in the charter.

By the Irish Church Act, 1869 (32 & 33 Vict. c. 42), passed on July 26, 1869, it was provided (s. 2) that on January 1, 1871, the parliamentary union between the churches of England and Ireland should be dissolved and the church of Ireland should cease to be established by law, but (s. 69) in all enactments, deeds, and other documents in which mention was made of the united church of England and Ireland, the enactments and provisions relating thereto should be read distributively in respect of the church of England and the church of Ireland, but, as to the last-mentioned church, subject to the provisions of the Act.

By a supplemental charter dated July 2, 1873, after reciting the original charter and making certain alterations in the scheme of management it was provided (clause 7) that with respect to pensions thereafter to be granted the corporation should have power to make such alterations and regulations and to impose such conditions not only as to the amount and conditions of tenure of those pensions, but also as to their duration, and as to the same being permanent or temporary or otherwise, as at a special general meeting to be called for that purpose might from time to time be determined ; and (clause 8) that nothing therein contained should prejudice or affect the original charter except so far as the same was thereby expressly altered ; and the original charter was thereby ratified and confirmed in all respects save so far as thereby expressly altered ; and (clause 9) that the supplemental charter should be recognized by the Courts in Great Britain and Ireland or elsewhere and should be taken construed and adjudged in the most favourable and beneficial sense and for the best advantage of the corporation, as well in the Courts of Record in Great Britain and Ireland as elsewhere, notwithstanding any recital, non-recital, mis-recital, uncertainty or imperfection in the supplemental charter.

After the disestablishment of the Irish church the

ASTBURY
J.

1920

FRIEND
OF THE
CLERGY'S
CHARTERS,
In re.

FRIEND
OF THE
CLERGY
v.
ATTORNEY-
GENERAL.

ASTBURY
J.

1920

FRIEND
OF THE
CLERGY'S
CHARTERS,
In re.

FRIEND
OF THE
CLERGY
v.

ATTORNEY-
GENERAL.

corporation had ceased to treat clergymen of that church and their families as within the scope of the charter. It now wished, if lawful, to do so, and this was the third question raised by the summons.

By the Welsh Church Act, 1914 (4 & 5 Geo. 5, c. 91), s. 1, the church of [England so far as it extended to and existed in Wales and Monmouthshire (thereinafter called the Church in Wales) was disestablished on a date ultimately fixed as March 31, 1920.

By s. 2, sub-s. 4: "On and after the date of disestablishment no person shall be disqualified or liable to any penalty for sitting or voting in the House of Commons by reason of having been ordained to the office of priest or deacon if the ecclesiastical office he holds is an ecclesiastical office in the church in Wales, or, if he does not hold any ecclesiastical office, if the last ecclesiastical office which he held was an ecclesiastical office in the church in Wales."

By s. 3: From the date of disestablishment ecclesiastical courts and persons in Wales and Monmouthshire were to cease to exercise any jurisdiction, and the ecclesiastical law of the church in Wales was to cease to exist as law, but the constitution and regulations of the church in Wales might provide for the establishment of ecclesiastical courts for that Church. The bishops and clergy of the church in Wales were to cease to be members of or be represented in the Houses of Convocation of the Province of Canterbury.

By s. 9, sub-s. 3: "Any ecclesiastical parish which is at the passing of this Act situate wholly in Wales or Monmouthshire . . . and forms part of an English diocese, shall, as from the date of disestablishment cease to form part of that diocese, and shall be attached to such Welsh diocese as may be determined in manner provided by the constitution and regulations of the church in Wales."

By the Welsh Church (Temporalities) Act, 1919, s. 2, the date of disestablishment was fixed as March 31, 1920.

By s. 7, sub-s. 2: "Where by any charter, deed, or other document any association, institution, or society, whether corporate or unincorporate, is empowered, or is under a duty,

to make any grant or payment to any persons or body of persons, whether corporate or unincorporate, in Wales and Monmouthshire, such power or duty shall not be affected by reason of any parish of the church in Wales ceasing to be a part of the province of Canterbury or of York, notwithstanding anything contained in any such charter, deed, or document."

On June 3, 1920, the corporation issued this summons to determine whether the following persons and their families were within the scope of the charter :—

1. (a) Clergy ordained to the ministry of the established church of England before the Welsh disestablishment and holding office in Wales at and since that date.

(b) Clergy ordained to the ministry of the established church of England at any time who took office in Wales after the disestablishment.

(c) Clergy ordained to the ministry of the disestablished church of Wales.

2. Pre-disestablishment Welsh pensioners.

3. (a) Clergy ordained to the ministry of the established church of England and Ireland before the Irish disestablishment and holding office in Ireland.

(b) Clergy ordained to the ministry of the established church of England since the Irish disestablishment and holding office in Ireland.

(c) Clergy ordained to the ministry of the disestablished church of Ireland.

4. (a) Clergy ordained to the ministry of the established church of England who take office in Scotland.

(b) Clergy ordained to the ministry of the episcopal church of Scotland, who have not obtained licence to officiate in England.

5. (a) Clergy ordained to the ministry of the established church of England and holding office in a British dominion church consistent therewith.

(b) Clergy ordained to the ministry of the established church of England exclusively for service in the British dominions, or ordained to the ministry of a dominion church, who have not obtained licence to officiate in England.

ASTBURY
J.

1920

FRIEND
OF THE
CLERGY'S
CHARTERS,
In re.

FRIEND
OF THE
CLERGY
v.

ATTORNEY-
GENERAL.

ASTBURY
J.

1920

FRIEND
OF THE
CLERGY'S
CHARTERS,
In re.

FRIEND
OF THE
CLERGY
v.
ATTORNEY-
GENERAL.

Jenkins K.C. and R. M. Pattisson for the corporation.

Question 2 is not disputed. In other words the existing Welsh pre-disestablishment pensions were properly granted and may be continued.

On the other questions the broad point is that a clergyman ordained to the ministry of the established church of England does not lose his status by taking a consistent cure in Wales, Ireland, Scotland or the British dominions. The continuance of this status is recognized (*inter alia*) in the Government of India Act, 1915 (5 & 6 Geo. 5, c. 61), s. 115, sub-s. 1, which mentions "ministers of the church of England" in the dioceses of Calcutta, Madras and Bombay. This broad principle requires an affirmative answer to questions 1 (*a*) (*b*); 3 (*a*) (*b*); 4 (*a*) and 5 (*a*).

As to question 1 (*c*). A clergyman originally ordained to the ministry of the disestablished Welsh church could be licensed to officiate in England without fresh ordination. He is therefore potentially a clergyman of the established church of England. If this potential status is not in itself sufficient, the point is expressly covered by the Welsh Church (Temporalities) Act, 1919, s. 7, sub-s. 2.

The Court however is asked to leave this question open.

As to question 3 (*c*). Having regard to the Irish Church Act, 1869, s. 69, and the fact that the original charter which mentions the united church of England and Ireland was confirmed after that Act, the words "clergymen of the established Church of England and Ireland" must be read distributively—i.e., "clergymen of the established church of England and the disestablished church of Ireland"—and the question must be answered in the affirmative.

As to questions 4 (*b*) and 5 (*b*). Clergymen originally ordained to the ministry of the episcopal church of Scotland, or to the ministry of the established church of England exclusively for service in the dominions, or ordained to a dominion ministry, can be licensed to officiate in England without fresh ordination. They have therefore a potential status as ministers of the established church of England.

The Court, however, is asked to leave these questions open.

Austen-Cartmell and *Harold Danckwerts* for the Attorney-General. "Clergymen of the established church of England" means persons in holy orders holding office in the established church of England: Blackstone's Commentaries, 1st ed., vol. i., bk. 1, ch. 11, p. 364. They must also take and subscribe the oath of allegiance and supremacy: Clerical Subscription Act, 1865 (28 & 29 Vict. c. 122), s. 5. If such a clergyman takes office in Wales, Ireland, Scotland or the British dominions he retains his status of a minister in holy orders, but he loses his official status *pro tempore* as a clergyman of the established church of England, unless of course he has the cure of a local church of England congregation.

That answers the broad status point.

As to question 1. The Welsh Church (Temporalities) Act, 1919, s. 7, sub-s. 2, turns entirely on the parish and means that parochial and similar grants are not to be prejudiced. It does not touch the question of clerical status or in any way get over the necessity of the oath of allegiance and supremacy.

The question of status is dealt with by the Welsh Church Act, 1914, s. 2, sub-s. 4, which allows a priest or deacon holding office in the disestablished church in Wales to sit in parliament. It clearly includes priests or deacons originally ordained to the ministry of the established church of England, and it distinctly implies that they lose that disqualifying status while holding office in the disestablished church in Wales. If, as suggested, they retain that status, this sub-section would be a very anomalous provision and s. 7, sub-s. 2, of the 1919 Act would be unnecessary.

As to question 3. The distributive reading directed by the Irish Church Act, 1869, s. 69, is expressly subject to the disestablishment provisions. The charter speaks of the "established" church of England and Ireland and only mentions the "united" church in a subsidiary provision as to officers.

As to questions 4 and 5. Neither a Scottish episcopalian clergyman nor a British dominion clergyman can officiate here without licence: Episcopal Church (Scotland) Act,

ASTBURY
J.

1920

FRIEND
OF THE
CLERGY'S
CHARTERS,
In re.

FRIEND
OF THE
CLERGY
v.
ATTORNEY-
GENERAL.

ASTBURY J. 1864 (27 & 28 Vict. c. 94), s. 5; Ordinations for Colonies Act, 1819 (59 Geo. 3, c. 60), s. 2.

1920

FRIEND
OF THE
CLERGY'S
CHARTERS,
In re.

We are quite content to leave questions 1 (c), 4 (b) and 5 (b) open.

Jenkins K.C. in reply.

FRIEND
OF THE
CLERGY
v.
ATTORNEY-
GENERAL.
—

ASTBURY J. This is a summons to determine a series of questions as to the true construction of a charter of 1854, and a supplemental charter of 1873, whereby a charity, or society, formed in 1849 and called the Friend of the Clergy, was constituted a body corporate for the purposes of the charity, with a subsequent confirmation for similar objects.

The immediate object of the summons is to obtain a decision upon a number of questions that have become doubtful owing to the disestablishment of the church in Wales, but advantage has been taken to obtain, or attempt to obtain, a decision upon a number of other questions relating to the church of Ireland, the episcopal church of Scotland, and the churches in the British dominions beyond the seas.

The object of the charity was to provide permanent pensions for the widows and orphan unmarried daughters of clergymen of the established church of England and Ireland, and for the purpose of affording temporary assistance to necessitous clergymen of such church and their families.

After the disestablishment of the Irish church on January 1, 1871, a supplemental charter of July 2, 1873, was granted reciting the object of the original charter, making a certain number of subsidiary alterations in the powers of the corporation—e.g., enabling the grant of temporary pensions and finally ratifying and confirming the original charter in all respects.

Question 2 is not opposed by the Attorney-General, and I will get rid of it at once. It asks whether the corporation may, after the date of the Welsh disestablishment, apply its funds in continuing the payment of pensions granted before that date to widows and orphan unmarried daughters of persons who, at their deaths, were clergymen of the established church of England holding office in Wales and

Monmouthshire. The answer to that question will be in the affirmative. ASTBURY
J.

Question 1 (a) asks whether the corporation may benefit a necessitous clergyman, or the widow and orphan unmarried daughters of a clergyman ordained to the ministry of the established church of England before the Welsh disestablishment, and holding office in Wales at and since that disestablishment. In my judgment a clergyman ordained to the ministry of the established church of England before the Welsh disestablishment obtained a status which he has not lost, as far as being able to receive benefits from this corporation is concerned, by reason of the disestablishment of the Welsh church, and persons falling within that category are still entitled to assistance.

1920
—
FRIEND
OF THE
CLERGY'S
CHARTERS,
In re.
FRIEND
OF THE
CLERGY
v.
ATTORNEY-
GENERAL.

Question 1 (b) relates to clergymen ordained to the ministry of the established church of England at any time who have gone to Wales either before or since the Welsh disestablishment. These again, in my opinion, fall within the scope of this charter, and pensions and assistance may be granted to them and their families.

Question 1 (c) relates to clergymen ordained to the ministry of the disestablished church in Wales. *Prima facie* this ordination did not make them clergymen of the established church of England; but I refrain as requested from giving any final decision upon this point.

Before leaving the Welsh clergymen I must bear in mind two provisions in the Welsh Church Acts, 1914 and 1919. [His Lordship read s. 2, sub-s. 4, of the Welsh Church Act, 1914, and s. 7, sub-s. 2, of the Welsh Church (Temporalities) Act, 1919.]

This corporation, under its charter, was empowered to make payments to persons in Wales and Monmouthshire, and the provision of the latter sub-section is that such power shall not be affected by reason of any parish of the church in Wales ceasing to be part of the province of Canterbury or of York. That provision assists me in answering question 1 (a) and (b) in the affirmative, and s. 2, sub-s. 4, of the 1914 Act does not prevent that construction.

ASTBURY
J.

1920

FRIEND
OF THE
CLERGY'S
CHARTERS,
In re.

FRIEND
OF THE
CLERGY
v.

ATTORNEY-
GENERAL.
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Question 3 (a) relates to clergymen ordained to the ministry of the established church of England and Ireland before the Irish disestablishment and holding office in Ireland, and question 3 (b) relates to clergymen ordained to the ministry of the established church of England since the Irish disestablishment and holding office in Ireland. They and their families are in the same position as those referred to in question 1 (a) and (b) and the same decision will apply.

Question 3 (c) relates to clergymen ordained to the ministry of the disestablished church of Ireland whom with their families the corporation though it has not hitherto done so now desires to benefit. This case differs from the Welsh case by reason of the special provision of the Irish Church Act, 1869, s. 69. [His Lordship read the section.] Putting it shortly it provides that a reference in any deed or document executed before July 26, 1869, to the "united church of England and Ireland" shall be read distributively in respect of the church of England and the disestablished church of Ireland subject as to the last-mentioned church to the disestablishment provisions. It is contended that this original charter contains a reference to the "united church of England and Ireland" within the meaning of this section, and that the effect of the section is to make the corporation's funds applicable after January 1, 1871, to original ministers of the disestablished Irish church. The charter refers in terms to the "united church of England and Ireland." It also refers in terms to what it describes as the "established church of England and Ireland." Personally I see no difference in the two expressions. The objects of the corporation are stated to be to provide pensions for the widows and orphan unmarried daughters of clergymen of the "established church of England and Ireland," and for the purpose of affording temporary assistance to necessitous clergymen of such church and their families. Later on the charter provides that before any person shall be entitled to act as president, vice-president, treasurer, committee-man, or auditor of the society he shall sign a declaration that he is a member of the "united church of England and Ireland." Added to that there is the fact that in the

supplemental charter of 1873 the original objects are stated, and the charter is ratified and confirmed after the passing of the Irish Church Act, 1869. The original charter appears to regard the expression, "established church of England and Ireland" and "united church of England and Ireland" as one and the same thing, because it is difficult to suppose that officers were to be selected from a body not within the objects of the corporation. That charter is expressly confirmed after the disestablishment of the Irish church. I have therefore come to the conclusion, though the matter is, perhaps, somewhat difficult, that clergymen originally ordained to the ministry of the disestablished church of Ireland, and holding office in that church, are within the benefit provisions of this charter.

Question 4 (a) relates to clergymen ordained to the ministry of the established church of England holding office in Scotland. With regard to these I think they obtained their status as members of the established church of England, and that the mere fact of officiating or holding office in Scotland is insufficient to deprive them of that status.

Question 4 (b) relates to clergymen originally ordained to the ministry of the episcopal church of Scotland who have not subsequently obtained the necessary licence or consent to hold office in the established church in England. With regard to this class I am asked not to give a decision, and therefore again refrain from doing so.

Question 5 (a) relates to clergymen ordained to the ministry of the established church of England and holding office in the British dominions beyond the seas. In my opinion clergymen ordained to the ministry of the established church of England do not lose their status as such, and their rights of benefit under this charter by going to, and holding office in, the dominions, provided that such office is an office not inconsistent with the creeds and beliefs of the established church.

Question 5 (b) relates to clergymen originally ordained to the ministry of the established church of England exclusively for service in the British dominions or ordained to the ministry

ASTBURY
J.

1920

FRIEND
OF THE
CLERGY'S
CHARTERS,
In re.

FRIEND
OF THE
CLERGY
v.
ATTORNEY-
GENERAL.

ASTBURY of a dominion church and who require a further assent or
 J. licence from a bishop before they can hold office in a parish
 1920 in the church of England in this country. With regard to
 FRIEND those again I am asked not to decide the matter, and therefore
 OF THE refrain from doing so.
 CLERGY'S
 CHARTERS,
 In re.

Solicitors : *Charles Sawbridge & Son ; Treasury Solicitor.*

G. R. A.

ASTBURY
 J.

WISE v. LANSDELL.

1920

[1920. W. 557.]

Nov. 11, 12.

Bankruptcy—Disclaimer—Fully paid Shares—Equitable Charges thereon—Disclaimer of Trustee's Interest—Bankrupt's Name still on Register—Right to Vote on behalf of Mortgagees—Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 54.

The registered owner of fully paid shares in a private company charged them in favour of W., and handed him the certificates and a blank transfer. He subsequently gave other equitable charges to other mortgagees. On the owner's bankruptcy his trustee disclaimed "all my interest" in the shares under s. 54 of the Bankruptcy Act, 1914, but, as the blank transfer was not completed and lodged and none of the mortgagees applied for a vesting order, the bankrupt's name remained on the register :—

Held, that, as between himself and the company, the bankrupt, so long as his name remained on the register, was entitled to vote in respect of the shares, though, as between himself and the mortgagees, he could only vote as they dictated.

Held, also, that the trustee could not have disclaimed more than the equity of redemption in the shares.

Whether a trustee can disclaim unincumbered fully paid shares, *quaere*.

WITNESS ACTION.

The defendant company, Wise & Lansdell, Ltd., was incorporated on August 5, 1910, as a private company with a capital of 2000*l.* divided into 1996 ordinary 1*l.* shares and 16 founders' 5*s.* shares, of which 827 ordinary and 16 founders' shares were issued and fully paid. The memorandum was subscribed by the plaintiff Wise and the defendant Lansdell.

The plaintiff Wise held 473 ordinary shares. His wife the

plaintiff Mrs. Wise held 9 founders' shares. The defendant
 Lansdell held 324 ordinary and 7 founders' shares. His wife
 the defendant Mrs. Lansdell held 20 ordinary shares. Their
 son E. C. Lansdell held 5 ordinary shares, and the remaining
 5 ordinary shares were held by an infant Joyce Snelling
 daughter of the company's solicitor.

ASTBURY
 J.
 1920
 WISE
 v.
 LANSDELL.

The articles consisted of special articles and a number of articles from Table A.

By special art. 6 the company shall be entitled to treat the person whose name appears upon the register in respect of any share as the absolute owner thereof and shall not be under any obligation to recognize any trust or equity or equitable claim to or partial interest in such share, whether or not it shall have express or other notice thereof.

Special art. 14 clauses (a), (b) and (c) contained detailed provisions to the effect that a member could not sell his shares without first offering them through the secretary to the other members at the price he was willing to accept. So far as the offer was not accepted he could then dispose of the shares to an outsider at the same or a higher price.

Clause (d) provided that if any person became entitled to any share by reason of the bankruptcy of any member he should forthwith offer the same for sale to the members at a "fair price to be determined by agreement between such person and the directors, or, in default of agreement, by a single independent arbitrator who shall be appointed by the directors, but shall be paid by such person." The arbitrator's fee was not to exceed five guineas. As soon as the fair price was determined the said person was to give the secretary a notice of sale at that price, and on his failing so to do the directors might give the notice as his agents.

Special art. 15 provided that save as aforesaid the directors might refuse to register any transfer; and might decline to recognize any instrument of transfer unaccompanied by the share certificate.

By special art. 21 a poll was to be taken whenever demanded by two members holding or representing not less than one-tenth of the issued capital.

ASTBURY
J.

1920

WISE
v.

LANDSELL.

Special art. 24 appointed Wise and Lansdell life directors.

Special art. 29 vacated a director's office on bankruptcy.

By special art. 32 the net profits (after redeeming each year one of ten 50*l.* debentures beginning on May 23, 1913) were to be applied in paying a 10 per cent. dividend on the ordinary shares and the balance was distributable as dividend on the founders' shares (which dividend had hitherto averaged about 50*l.* per share).

Table A arts. 18 and 19 provided a form of transfer to be executed under the hands of the transferor and transferee (i.e., not under seal). The transferor was to remain a holder until the transferee was registered.

By Table A art. 22 any person becoming entitled to a share in consequence of a member's bankruptcy had the right either to be registered as a member in respect of the share, or to make such transfer as the bankrupt could have made; but the directors had the same right to decline registration as they would have had in the case of a transfer before bankruptcy.

By Table A art. 23 a person becoming entitled to a share by reason of the holder's bankruptcy shall be entitled to the same dividends and other advantages to which he would be entitled if he were the registered holder, except that he shall not, before being registered as a member, be entitled to exercise any right conferred by membership in relation to meetings of the company.

By Table A art. 28 a person whose shares have been forfeited shall cease to be a member in respect of the forfeited shares.

By Table A art. 60 on a show of hands every member present in person had one vote. On a poll every member had one vote per share and (art. 64) might vote by proxy.

On March 26, 1915, Wise charged (*inter alia*) his 473 ordinary shares (subject to a 350*l.* charge to Burnage) in favour of Williamson to secure 500*l.* At the same time he handed Williamson the certificates and a blank transfer. Only 78*l.* was now due on this charge.

On March 27 Wise gave a second charge to Cooper Everett

and Gawith (who on October 16, 1919, released it to Cooper and Everett) to secure 650*l.*, and on September 30 he gave Cooper and Everett a third charge by way of indemnity against a guarantee of 13,000*l.* (now reduced to 6000*l.*) given by them to secure his banking account. These charges were subject to Burnage's 350*l.* charge since paid off.

ASTBURY
J.
1920
WISE
v.
LANDSELL.

On August 22, 1917, a receiving order in bankruptcy was made against Wise on a petition dated August 3. On October 13 he was adjudicated bankrupt and the official receiver became his trustee. His directorship being thereby vacated, Mrs. Lansdell was appointed a director on November 1.

Considerable correspondence subsequently took place between the company and the trustee as to the incumbered shares. The company wished to enforce special art. 14 (*d*), and on May 2, 1919, gave the trustee formal notice to comply with it. The trustee wished to protect the mortgagees as far as possible in the matter of value, and was unwilling to comply with art. 14 (*d*).

In the result the trustee on May 21, 1919, gave the company and the mortgagees notice of his intention to disclaim "all my interest" in the 473 ordinary shares of which Wise was the registered holder.

On June 27, 1919, the trustee formally disclaimed "all my interest" in the 473 ordinary shares of which Wise was the registered holder and stated that notice of the disclaimer had been given to the company and the mortgagees.

On August 14, 1919, the three Lansdells applied to the Southampton County Court for a vesting order on the ground that they were entitled to buy the shares under special art. 14 (*d*). This was opposed by the mortgagees on the ground that the Lansdells had no interest in the disclaimed property. Judgment was reserved, and on October 14 the application was dismissed.

At the annual general meeting of February 28, 1920, a resolution was passed reappointing Mrs. Lansdell, who was due to retire, a director for the ensuing year. The three Lansdells voted for and the two Wises against the resolution, but the chairman Lansdell refused to accept Wise's vote.

ASTBURY J. 1920 WISE v. LANSDELL. The two Wises then demanded a poll on which they would have 482 votes against the Lansdells 356, but the chairman refused it on the ground that Wise was not a shareholder and not entitled to vote, and Mrs. Wise's demand was insufficient under special art. 21.

At an extraordinary meeting of the same date a special resolution for voluntary winding up was passed in the same way and a similar demand for a poll refused. This resolution was confirmed on March 27 at a meeting which the Wises did not attend.

In the meantime, on March 4, 1920, the plaintiffs commenced this action for a declaration that the resolutions were invalid and an injunction restraining the defendants from acting on them. A further claim that at a general meeting of February 15, 1919, the bankrupt and his wife had validly appointed the bankrupt general manager at 4*l.* a week was abandoned at the hearing, such an appointment being a matter for the board.

The matter then came before P. O. Lawrence J. on March 12 and 19 on a motion for an interlocutory injunction supported by an affidavit on behalf of Cooper and Everett. He stood it over to March 26 to give the mortgagees, the parties really interested, an opportunity to join as plaintiffs or obtain a vesting order. The mortgagees not wishing to risk costs and having regard to special art. 14 (*d*) did not adopt either suggestion, and on the balance of convenience the judge made no order, leaving all questions to be determined at the trial.

Luxmoore K.C. and *G. G. Solomon* for the plaintiffs. Wise signed the memorandum and clearly became a member of the company under the Companies (Consolidation) Act, 1908, s. 24. Before his bankruptcy he was the registered holder of 473 fully paid shares in respect of which he had a right to vote. The shares however were so heavily incumbered that he had really a bare equity of redemption, and would have been bound to consult the wishes of the mortgagees. Otherwise the first mortgagee could have completed the blank transfer

and removed him : Buckley on Companies, 9th ed., p. 577 ; ASTBURY
Ex parte Sargent. (1)

Now what was the effect of the bankruptcy (2) ? The

(1) (1874) L. R. 17 Eq. 273.

(2) The Bankruptcy Act, 1914,
 provides as follows :—

Sect. 38 : “The property of the bankrupt divisible amongst his creditors . . . shall comprise the following particulars :—

(a) All such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve on him before his discharge ; and

(b) The capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of property as might have been exercised by the bankrupt for his own benefit at the commencement of his bankruptcy or before his discharge, except the right of nomination to a vacant ecclesiastical benefice” ;

Sect. 48, sub-s. 3 : “Where any part of the property of the bankrupt consists of . . . shares, or any other property transferable in the books of any company . . . the trustee may exercise the right to transfer the property to the same extent as the bankrupt might have exercised it if he had not become bankrupt.”

Sect. 53, sub-s. 1 : “Until a trustee is appointed, the official receiver shall be the trustee for the purposes of this Act, and, immediately on a debtor being adjudged bankrupt, the property of the bankrupt shall vest in the trustee.”

Sect. 54, sub-s. 1 : “Where any part of the property of the bankrupt consists of land of any tenure burdened with onerous covenants, of shares or stock in companies, of

unprofitable contracts, or of any other property that is unsaleable, or not readily saleable, by reason of its binding the possessor thereof to the performance of any onerous act, or to the payment of any sum of money, the trustee . . . may . . . disclaim the property” : . . .

Sub-s. 2 : “The disclaimer shall operate to determine, as from the date of disclaimer, the rights, interests, and liabilities of the bankrupt and his property in or in respect of the property disclaimed, and shall also discharge the trustee from all personal liability in respect of the property disclaimed as from the date when the property vested in him, but shall not, except so far as is necessary for the purpose of releasing the bankrupt and his property and the trustee from liability, affect the rights or liabilities of any other person.”

Sub-s. 6 : “The Court may, on application by any person either claiming any interest in any disclaimed property or under any liability not discharged by this Act in respect of any disclaimed property, and on hearing such persons as it thinks fit, make an order for the vesting of the property in or delivery thereof to any person entitled thereto, or to whom it may seem just that the same should be delivered by way of compensation for such liability as aforesaid, or a trustee for him, and on such terms as the Court thinks just ; and on any such vesting order being made, the property comprised therein shall vest accordingly in the person therein named in that behalf without any conveyance or assignment for the purpose” : . . .

1920
 WISE
 v.
 LANSDALL.

ASTBURY equity of redemption and the bankrupt's right to vote in his
 J. own interest (if any) formed the only property of the bankrupt
 1920 under s. 38, and these items were all that vested in the trustee
 WISE under s. 53 : *In re London and Provincial Telegraph Co.* (1)
 v. The bankrupt's right to vote on behalf of the mortgagees
 LANSDSELL. remained in him.

The trustee could no doubt have transferred the shares under s. 48, sub-s. 3, but he could only have transferred them subject to the incumbrances. In other words he could only have transferred the equity of redemption. The directors would presumably have registered the transferee : *Evans v. Wood*. (2) If special art. 14 (d) is a clog on that statutory right, it is ultra vires.

The same reasoning applies to the disclaimer under s. 54. The trustee could only disclaim his interest and this was all he purported to do. The section read as a whole is confined to the disclaimer of onerous property and does not apply to fully paid shares : *Buckley on Companies*, 9th ed., p. 587 ; *Ex parte Walton*. (3) The equity of redemption and the bankrupt's right to vote in respect thereof ceased, but he remained the registered owner with a right to vote on behalf of the mortgagees : This right has been denied him and the resolutions are consequently invalid.

The trustee himself could not have got on the register even with the consent of the mortgagees : *Ex parte Harrison* (4) ; and until the bankrupt is removed by them he can vote, presumably on their behalf, though that is a matter into which the company as between itself and the registered holder has no right to inquire.

Micklem K.C. and *Cecil Turner* for the defendants. Before the bankruptcy Wise was the registered holder and legal owner of the 473 incumbered shares. He had a full right of voting. If the first equitable mortgagee did not like the way

Sub-s. 8 : "Any person injured accordingly prove the same as a
 by the operation of a disclaimer debt under the bankruptcy."

under this section shall be deemed (1) (1870) L. R. 9 Eq. 653, 657.

to be a creditor of the bankrupt to (2) (1867) L. R. 5 Eq. 9.

the extent of the injury, and may (3) (1881) 17 Ch. D. 746, 750, 753.

(4) (1885) 28 Ch. D. 363, 369, 370.

he voted he could have completed his blank transfer and removed Wise from the register. But until this was done Wise as between himself and the company which (special art. 6) does not recognize trusts or equities had complete dominion over the shares.

ASTBURY
J.
1920
WISE
v.
LANSDSELL.

On the bankruptcy the entire property in the shares and the right to vote passed to the trustee under s. 38, sub-ss. (a) (b). He could have transferred the entire shares, subject of course to the incumbrances, under s. 48, sub-s. 3. In that case special art. 14 (d) would have applied. The article merely provides a special mode of ascertaining the fair price and is perfectly valid: *Borland's Trustee v. Steel Bros. & Co.* (1)

The trustee's duty was to realize or disclaim the shares, and he elected to disclaim them under s. 54, sub-s. 1. That section which reproduces s. 55 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), applies to all shares fully paid or not, and is not like s. 23 of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), confined to unmarketable shares.

The particular shares were however onerous and not readily saleable owing to the heavy incumbrances, so this question does not really arise. The disclaimer was clearly valid and determined the bankrupt's rights in the shares under s. 54, sub-s. 2, including his right to vote in respect thereof, which is a right of property: *Pender v. Lushington*. (2) His membership was also determined: *Palmer's Company Precedents*, 11th ed., pt. i., p. 58; and neither he nor his trustee could have been put on the list of contributories: *In re West of England Bank*. (3)

In *Ex parte Harrison* (4) the transfer was completed and there was a good legal charge. Here it remained equitable. The company cannot of course disregard the mortgagees, whose rights though only equitable are preserved by s. 54, sub-s. 2. But they are not suing, and the bankrupt himself though still on the register has no interest or locus standi. He is in much the same position as a member who has

(1) [1901] 1 Ch. 279, 291.

(2) (1877) 6 Ch. D. 70.

(3) (1879) 12 Ch. D. 288.

(4) 28 Ch. D. 363, 369, 370.

ASTBURY J. forfeited his shares—i.e., he is no longer a member: see Table A, art. 28.

1920
WISE
v.
LANSDALL.

The mortgagees have not been deprived of a right to vote. They never possessed one. They could get a vesting order under s. 54, sub-s. 6, or prove as creditors under s. 54, sub-s. 8. But they have no right to vote until they are on the register.

In the present case the expression "equity of redemption" is a misnomer. The bankrupt was not entitled to any equity of redemption. He was the legal owner of the shares subject to equitable incumbrances, just as an owner in fee simple who has deposited his title deeds by way of equitable mortgage is still owner in fee simple of the entire legal estate.

Again the only blank transfer was that given to Williamson and, in view of Burnage's then existing charge, improperly given. Williamson's charge is now only 78*l.*, so that he is quite safe. The other mortgagees have no blank transfers, and cannot conceivably bring themselves within *Ex parte Harrison*. (1)

Luxmoore K.C. in reply.

ASTBURY J. [after stating the facts]. The only question is whether in these circumstances the resolutions of February 28, 1920, are valid or not.

Wise subscribed the memorandum and became a member, and his name has throughout remained upon the company's register: see Companies (Consolidation) Act, 1908, s. 24. [His Lordship then read s. 38 of the Bankruptcy Act, 1914, providing what the property of a bankrupt divisible amongst his creditors shall comprise, and continued:] Now at the date of the bankruptcy Wise was entitled to incumbered ordinary shares. He had executed a blank transfer which Williamson to whom it was handed could at any time have filled up and prevented the trustee in bankruptcy from obtaining registration as a member. Wise himself before his bankruptcy had the right to vote beneficially in respect of his shares. The right to place himself in a position to exercise that voting power, subject to the rights of the mortgagees,

passed to the trustee under ss. 38 and 53, although he clearly could not exercise it, or attempt to do so, unless and until he had had the name of the bankrupt removed from the register, and his own name substituted. [His Lordship then read s. 48, sub-s. 3, giving the trustee a right to transfer shares, and continued :] It is plain, therefore, that subject to the restrictions contained in the articles, and subject to the mortgagees' rights, the trustee in bankruptcy obtained the further right to transfer the bankrupt's shares.

ASTBURY
J.
1920
WISE
v.
LANSDALL.

The disclaiming section of the Bankruptcy Act, 1914, is s. 54. That section and its predecessors have given rise to much litigation. [His Lordship read s. 54, sub-ss. 1, 2, and continued :] The corresponding s. 23 of the Bankruptcy Act, 1869, referred to "unmarketable shares." The present section, following s. 55 of the Bankruptcy Act, 1883, substitutes the words "shares or stock in companies."

Now I have heard a considerable argument as to whether fully paid shares in respect of which there is no liability or onerous characteristic fall within this section. I do not propose to embark upon any general question of that kind, but in my view, especially having regard to the method of construction referred to by Jessel M.R. in *Ex parte Walton* (1), I am of opinion that a trustee in bankruptcy is at least able to disclaim unsaleable or non-readily saleable incumbered shares held by the bankrupt, especially if there be difficulty, and probably expense in ascertaining, whether the equity of redemption, if I may so describe it, of the shares is of any value.

The question that I have to determine turns very largely upon the meaning of sub-s. 2. *Prima facie*, a trustee can only disclaim property for the purpose of getting rid of onerous burdens and liabilities, and no disclaimer, except so far as is necessary for the purpose of releasing the bankrupt, his property, and the trustee, from liability, is to affect the rights and liabilities of third persons.

Now in the present case there were mortgagees of these shares, whose rights the trustee appears to have thought

ASTBURY J.
1920
WISE
v.
LANSDALL.

exhausted their value; hence his disclaimer. The mortgagee who held the blank transfer was entitled as against the trustee in bankruptcy at any time after the bankruptcy to fill in the transfer and prevent the trustee from coming upon the register in respect of the shares. The bankrupt's interest, as far as it was a beneficial interest, in these shares had ceased to exist, but as between the real owners of the shares and the other shareholders in the company, he still had left in him a voting power by reason of being on the register. This voting power was exercisable at the dictation of those entitled to the beneficial interest in the shares which the mortgagor's bankruptcy in no way affected. I have no evidence as to what instructions, if any, were given to the bankrupt before the meeting of February 28, when the votes which he tendered were refused. It appears to me, although I think the question is a difficult one, that certain machinery was open to the mortgagees under which they could have obtained the right to vote directly in respect of these shares, though whether they would, in the circumstances, have been wise in coming upon the register may possibly be doubtful. It may very well be that before or instead of putting that machinery into operation they made use, or were entitled to make use, of the voting power of their mortgagor as a registered member for the purpose of maintaining their rights. The defendants have not satisfied me that the vote given by Wise on February 28 was, as far as the defendants' rights are concerned, a vote which in the circumstances they were entitled to disregard. Mrs. Wise as a plaintiff shareholder is entitled to take and rely upon that point in her own interest. The bankrupt's right to take and rely upon it depends upon whether he acted as agent for the mortgagees. On that I have no evidence, and therefore express no opinion.

The plaintiffs (and in referring to them I rely more especially upon Mrs. Wise, who is entitled to be and sue as a plaintiff) contend that special art. 14 (*d*) is invalid as against the trustee in bankruptcy, because it prevents the trustee from realizing the bankrupt's property as beneficially as he could have realized it himself had it not been for the bankruptcy. I do

not think it is necessary to determine that. It is further said that the reason why the mortgagees of these shares did not take advantage of P. O. Lawrence J.'s offer to obtain registration in their own names was that they had some fear that if they did so they would be bound to offer their shares at a fair price within the meaning of special art. 14 (*d*). I am not concerned to discuss that, but I am bound to say that such fears (if any) were probably groundless. They were advised, apparently, that so long as Wise remained on the register as a member and was willing to act at their dictation it was unnecessary for them to accept the learned judge's offer. I am not prepared to dissent from the accuracy of that view.

ASTBURY
J.
1920
Wise
v.
LANSDELL.

Lastly the defendants contend that the effect of the disclaimer was to disclaim the shares as such. I do not quite follow how a trustee in bankruptcy can disclaim an incumbered share in such a way as to destroy the share. All that he really is entitled to disclaim is the bankrupt's interest. The bankrupt's interest was in this case subject to the rights of the mortgagees, not only under the charge, but under the blank transfer. The trustee was right and acted wisely in confining his disclaimer to the interest in these shares which had passed to him by reason of the bankruptcy. At the time when he disclaimed he had no right to vote at all in respect of the shares, not having been put upon the register of members. The only effect of his disclaimer therefore was to destroy, as far as he and the bankrupt were concerned, the beneficial interest that the bankrupt had held and the trustee at the time of the disclaimer did hold in these incumbered shares.

The defendants cannot escape blame for the trouble and difficulty that this case has caused, as they have taken no steps to take the bankrupt's name off the register. The voting power exercisable or obtainable in respect of these shares on behalf of those beneficially interested has not been destroyed by anything that has taken place in the bankruptcy.

There will therefore be a declaration that the resolutions of February 28 for voluntary liquidation and for the appointment of Mrs. Lansdell as a director, were invalid, and an

ASTBURY J. injunction to restrain the defendants from acting upon them.

1920

WISE
v.

LANSDELL.

As Mrs. Wise joined with her husband in making the claim with regard to his alleged appointment as general manager both parties are more or less equally to blame for the litigation. The defendants are not willing, apparently, although I have asked them, to allow the mortgagees' names to be inserted upon the register of members in lieu of the bankrupt's; and on the merits (if any) I direct that each party pay their own costs. (1)

Solicitors: *Savage Cooper & Wright; James, Mellor & Coleman, for Percy W. Snelling, Winchester.*

G. R. A.

EVE J.

1920

Dec. 9.

In re BOSTOCK'S SETTLEMENT.

NORRISH v. BOSTOCK.

[1920. B. 3304.]

Settlement—Grant of Freeholds subject to Mortgages—Remainder to Children—Absence of Words of Limitation—Life Estates.

By a settlement made upon his second marriage the husband conveyed freeholds (subject to existing mortgages thereon) to trustees to the use of the wife and himself for successive life interests and after his decease "in trust for the child or children" of the husband "now born or hereafter to be born who shall attain the age of 21 years and if more than one in equal shares as tenants in common and if there shall be no such child then in trust for the right heirs" of the husband. The husband then assigned leaseholds, chattels and a policy of insurance upon similar trusts which so far as the children were concerned were expressed in identical terms. The settlement also contained a provision enabling the trustees to "mortgage or charge the said premises hereinbefore expressed to be hereby conveyed and assigned with any sum or sums not exceeding together one-half of the expectant share of any child" and to "apply the same for his or her benefit or advancement." There was also a hotchpot clause to the effect that no child of his first marriage was "to take any part of the trust premises herein comprised without

(1) An appeal from this case was compromised.

bringing into hotchpot all sums of money and other benefits which he or she may receive " under an earlier settlement :—

Held, that there were no sufficient indications in the settlement of an intention that the children should take absolute interests in the freeholds and accordingly that in the absence of words of limitation they took life interests only.

EVE J.

1920

BOSTOCK'S
SETTLEMENT,
In re.

NORRISH
v.
BOSTOCK.

ADJOURNED SUMMONS.

By a settlement made upon William Bostock's second marriage and dated September 13, 1886, it was recited (amongst other things) that the intended husband was seised in fee simple of certain freehold lands subject to mortgages thereon and the husband by clause 1 conveyed the same to trustees to the use of the husband in fee simple until the intended marriage and afterwards to such uses as the husband and his intended wife Ada Lever should jointly appoint by deed and until such appointment and so far as any such appointment should not extend to the use of the wife for life without impeachment of waste and after her decease to the use of the husband for life without impeachment of waste and after his decease " in trust for the child or children of the said William Bostock now born or hereafter to be born who shall attain the age of 21 years and if more than one in equal shares as tenants in common and if there shall be no such child then in trust for the right heirs of the said William Bostock." Clause 2 contained an assignment of leaseholds subject to the mortgages thereon to the trustees upon similar trusts which so far as the children's interests were concerned were expressed in identical terms, except that the ultimate trust in default of children was to the husband's next of kin. Clauses 3 and 4 contained settlements of chattels and a policy of insurance by reference to the trusts of the leaseholds. Clause 5 gave the trustees power with the consent of the husband and wife or the survivor of them and after the death of the survivor at their own discretion to "sell the said lands messuages hereditaments and premises" and to invest the net proceeds as therein authorized and to stand possessed of the net proceeds and the investments thereof upon the same or like trusts and with and subject to the same or like powers and provisions as were thereinbefore declared and contained concerning the

EVE J. premises thereby conveyed and assigned or such of them as
1920 should be then subsisting. Clause 7 provided that the wife
BOSTOCK'S and husband during their respective lives and the trustees
SETTLEMENT, after the death of the survivor might by any deed "mortgage
In re. or charge the said premises hereinbefore expressed to be
NORRISH hereby conveyed and assigned with any sum or sums not
v. exceeding together one-half of the expectant share of any
BOSTOCK. child of the said William Bostock and apply the same for
his or her benefit or advancement." By clause 13 the pro-
visions made by this settlement and a previous settlement
therein mentioned for the benefit of the children of the husband
were not to be cumulative "and no child of his shall take
any part of the trust premises herein comprised without
bringing into hotchpot all sums of money and other benefits
which he or she may receive or be entitled to under or by
virtue of such previous settlement."

The husband died on February 20, 1920, leaving nine children by his first and second marriage, all of whom attained the age of 21 years and were still living. The defendant Eric Lever Bostock was one of these children. The husband and wife never exercised the joint power of appointment conferred on them over the freehold lands. These freehold lands were sold in 1896 and 1897 by the wife as tenant for life under the Settled Land Acts and the proceeds of sale invested in personalty and other realty.

On December 2, 1920, this summons was taken out by the present trustees of the settlement to have it determined whether the children of the husband who attained the age of 21 years became entitled for an estate in fee simple or other absolute interest in equal shares to the freehold lands thereby conveyed or the property representing the same or whether such children became entitled to such property in equal shares only for their respective lives.

Ackroyd for the trustees of the settlement.

Gamon for the trustees of the settlor's will. The general rule is that a grant of the legal estate in freeholds without words of limitation confers an estate for life only but that,

although in the case of a grant of an equitable estate^a the same rule applies prima facie, an absolute interest may pass if on the construction of the deed or settlement there is a sufficient indication of intension to confer it : *In re Monckton's Settlement* (1) ; *In re Whiston's Settlement*. (2) The analogy to legal limitations must be stronger when the grant is of an existing equitable estate and it is not created by the instrument itself. Here the settlement in terms confers legal estates. It is the existence of mortgages created before the settlement that makes the interests conferred equitable, and whenever the mortgages are got in they will become legal. In any case there are no sufficient indications here of an intention to give the children of the settlor absolute interests. *In re Whiston's Settlement* (2) shows that little reliance can be placed on the advancement clause, especially as the settlement includes other property besides the freeholds to which it is entirely appropriate, nor will the power of sale help : *In re Gillies' Settlement*. (3) No doubt reliance will be mainly placed on the terms of the limitation over which are inappropriate to follow a grant of life interests only, but in *Tatham v. Vernon* (4) no stress was laid on a similar limitation over.

Mather for Eric L. Bostock. The limitation over in default of children who attain a vested interest is the clearest possible indication of an intention that the children should take the freeholds absolutely : *In re Tringham's Trusts* (5) ; *In re Oliver's Settlement*. (6) Further the settling of the leaseholds, chattels, and policy of insurance in the same terms as the freeholds shows an intention that they were to go together : *In re Nutt's Settlement*. (7) The power of sale is more compatible with the children taking absolutely than for life.

[EVE J. It would be required in any case for the leaseholds.]

In view of *In re Whiston's Settlement* (2) and *In re Gillies'*

EVE J.
1920
BOSTOCK'S
SETTLEMENT,
In re.
NORRISH
v.
BOSTOCK.

(1) [1913] 2 Ch. 636.

(2) [1894] 1 Ch. 661.

(3) [1917] 2 Ch. 205.

(4) (1861) 29 Beav. 604.

(5) [1904] 2 Ch. 487.

(6) [1905] 1 Ch. 191.

(7) [1915] 2 Ch. 431.

EVE J. *Settlement* (1) it is impossible to say that the power of advancement standing alone is a sufficient indication of intention, 1920 but *In re Oliver's Settlement* (2) shows that it is conclusive BOSTOCK'S when coupled with the limitation over. The hotchpot clause SETTLEMENT, *In re*, also points to an intention to confer absolute interests in the NORRISH freeholds; and when all these matters are taken together, v. BOSTOCK. their cumulative effect drives the Court to the conclusion that the children take absolutely.

Gamon in reply on the new cases. The limitation over in *In re Tringham's Trusts* (3) and *In re Oliver's Settlement* (2) was quite different from that in the present case, as there was in those cases a power of appointment. In *In re Nutt's Settlement* (4) there was an intermingling of the realty and personalty that does not exist here: compare *In re Thursby's Settlement*. (5)

EVE J. The statement of the law applicable to the circumstances with which I have to deal is to be found in Lewin on Trusts, 10th ed., p. 117, and has recently received the imprimatur of two expressions of judicial approval. It is in these terms: "In creating a trust, a person need only make his meaning clear as to the interest he intends to give, without regarding the technical terms of the common law in the limitation of legal estates. An equitable fee may be created without the word 'heirs,' and an equitable entail without the words 'heirs of the body,' provided words be used which, though not technical, are yet popularly equivalent, or the intention otherwise sufficiently appears upon the face of the instrument." In this case it is not suggested that in the creation of the estate the settlor has used words popularly equivalent to the technical word "heirs," but it is suggested that, looking at the deed as a whole, the intention sufficiently appears upon the face of the instrument that the children are to take absolute interests in the freeholds, and not merely the life estates which the language used would confer upon them.

(1) [1917] 2 Ch. 205.

(3) [1904] 2 Ch. 487.

(2) [1905] 1 Ch. 191.

(4) [1915] 2 Ch. 431.

(5) [1910] 2 Ch. 181.

In these circumstances, it becomes necessary to examine the particular phrases in the instrument which are relied upon as evidencing the intention. In the first place it is pointed out that this is a settlement comprehending four classes of property, freeholds, leaseholds, chattels, and a chose-in-action; and that in respect of the last three of these classes the settlor's children take an absolute interest. That is relied upon as indicating, or at any rate tending to indicate, that the settlor must have intended their interest in the real estate to be equally absolute in character. It is perhaps not quite satisfactory to dispose of each of the points taken seriatim, because it may well be that, although no one of them standing alone would be sufficient evidence of the intention, yet the cumulative effect of all may establish it. For the moment then I will only say that the element I have referred to standing alone would not, in my opinion, be sufficient evidence of the intention, and my reason for so thinking is that there is no intermingling or mixing up of the four classes of settled property in this deed. Each class is dealt with separately and distinctly by appropriate language, and the fact that a particular class of property is ultimately to go to the settlor's children absolutely is, in my opinion, no warrant for saying that a different class of property must necessarily have been intended to go in the same manner. Moreover, there is great force in the argument founded upon the judgment of the Court of Appeal in *In re Thursby's Settlement*. (1) It is true that it did not become necessary for the Court to decide the precise point, but Farwell L.J., a past master on all questions relating to real property, indicated his opinion that, even if the second appointment to which he was then referring had extended to the real estate, it would not have conferred upon the beneficiaries anything more than a life interest in the real estate, although the real estate, on that construction, would have been treated and dealt with as part of "the trust moneys, stocks, funds and securities" comprised in the settlement.

Then it is said that the form of the gift over in this case

(1) [1910] 2 Ch. 181.

EVE J.
1920
BOSTOCK'S
SETTLEMENT,
In re.
NORRISH
v.
BOSTOCK.

EVE J. 1920
BOSTOCK'S
SETTLEMENT,
In re.
NORRISH
v.
BOSTOCK.

is very strong evidence of the intention to give the whole beneficial interest to the children. No case has been cited in which the provisions of the settlement immediately preceding the gift over are similar to the provisions in this case. In the cases on which reliance has been placed by Mr. Mather the limitations in favour of the children of the marriage are followed by a general power of appointment conferred on the settlor, or some other person, and the ultimate gift over has been in default of any exercise of that power. In these cases it has been successfully argued that the form of the gift over is a strong indication of an intention that the beneficiaries on failure of whom the general power of appointment became exercisable, were intended to take the whole beneficial interest. In this case the gift over, or the limitation in remainder, follows immediately on the gift to the children, and it is certainly not exhaustive of the circumstances in which it may take effect if, in fact, the interests of the children are limited to life interests. It is not, as one would expect, a gift in remainder on the death of the survivor of the life tenants, but it is a gift over on the failure of any child living to attain a vested interest; in other words, there is no express ultimate limitation of the fee, if the children's interests are cut down to life interests. To that extent, the gift over is in terms which are not exhaustive. As against the cases on which reliance has been placed by Mr. Mather, there is *Tatham v. Vernon* (1) where, although the point does not seem to have been taken in argument, the judgment proceeds upon the footing that a gift in remainder in the event of no child living to attain a vested interest, is no sufficient indication of the settlor's intention to confer absolute interests in lieu of life interests on the children who attained a vested interest.

Reliance is also placed upon the power of advancement. I am not at all sure whether, if I had to choose between the judgments of Chitty J. in *In re Whiston's Settlement* (2) and of Farwell J., as he then was, in *In re Oliver's Settlement* (3), I should not prefer the latter. In *In re Gillies' Settlement* (4)

(1) 29 Beav. 604.

(2) [1894] 1 Ch. 661.

(3) [1905] 1 Ch. 191.

(4) [1917] 2 Ch. 205.

the decision of Farwell J. in *In re Oliver's Settlement* (1) was not drawn to my attention, and contrary to my own impression, I felt constrained to disregard the advancement clause; and if here the only property comprised in the settlement out of which an advancement could be made was the real estate I should, as at present advised, be disposed to take the view expressed by Farwell J. that the insertion of such an advancement clause was some evidence of an intention to give absolute interests and not merely life interests. In this case however I can I think place very little reliance on the advancement clause. There were three other classes of property comprised in this settlement besides the freeholds, and there were therefore capital funds out of which an advancement could be properly made to a child without resort to the interest of the child in the real estate.

EVE J.
1920
BOSTOCK'S
SETTLEMENT,
In re.
NORRISH
v.
BOSTOCK.

Finally, reliance is placed upon the concluding paragraph of the settlement. It appears that some of the settlor's children by his first marriage were absolutely entitled to various benefits under a post-nuptial settlement made by the settlor's father-in-law, and the settlor by his settlement directs that no child of his shall take any part of the trust premises comprised in his settlement without bringing into hotchpot all sums of money and other benefits which he, or she, may receive or be entitled to under or by virtue of the other settlement. Mr. Mather argued that when the settlor spoke of his child taking part of the trust premises he was referring to an absolute interest in the trust premises as he must *prima facie* be taken to have been comparing absolute interests taken under this and the other settlement, and to have intended the one to be brought into hotchpot as against the other, and not to have contemplated that there would be a valuation of the life interest of each child taking under this settlement an interest in the real estate. That is an element which was not present in any of the reported cases; but the question I come back to is whether any of these elements separately, or all of them collectively, amount to a sufficient indication of the settlor's intention that, notwithstanding

(1) [1905] 1 Ch. 191.

EVE J. 1920
 BOSTOCK'S
 SETTLEMENT,
In re.
 NORRISH
v.
 BOSTOCK.

the language he has used, the interests of the children in the freeholds are to be absolute. I cannot help thinking that, in some of the cases—and I am not prepared to say that I did not do the same myself in my decision in *In re Gillies' Settlement* (1)—the Court has been too disposed to arrive at the conclusion that the testator must have intended the interests to be absolute, and in order to effectuate that supposed intention has treated as evidencing its existence the presence in the instrument of provisions and phrases the insertion of which was equally consistent with the non-existence of any such intention. I regret that I should have to arrive at the conclusion that there is not in this settlement a sufficient indication of the settlor's intention that the interests in the real estate should be other than that which they are expressed to be by the actual language used, that is to say, life interests.

Solicitors: *North, Kirk & Co., Liverpool*, for all parties.

H. C. G.

SARGANT J. ATTORNEY-GENERAL *v.* FULHAM CORPORATION.

1920

[1920. A. 1598.]

Dec. 2, 3.

Corporation—Municipal Corporation—Enterprise of carrying on a Laundry Business—Ultra vires—Baths and Wash-houses Act, 1846 (9 & 10 Vict. c. 74)—Baths and Wash-houses Act, 1847 (10 & 11 Vict. c. 61).

The Metropolitan Borough of Fulham was a statutory body created under the London Government Act, 1899, and an Order in Council made pursuant to that Act, and was not a common law corporation. Pursuant to its powers under the Baths and Wash-houses Acts, 1846 to 1878, to establish baths, wash-houses and open bathing places, it established a wash-house in which there were about 60 separate troughs or places at which persons coming there had facilities for washing their clothes (bringing their own soap and other requisites), and there was an additional place in which boiling water was supplied, and which performed the function of a copper. The persons bringing the clothes to be washed, boiled and blued them in the troughs and dealt with

them in the appropriate manner, the only manual or artificial assistance supplied by the corporation being thenceforth given by the corporation's employees. The clothes-bringers placed the washed clothes in wringers, which were stopped and started and only allowed to be worked by the corporation's attendant. The clothes were then placed on clothes-horses and pushed in and out of a hot-air drying cupboard, and were then mangled, in ordinary mangles worked by the clothes-bringers, or in a box-mangle, worked by or under the direction of another attendant of the corporation. The clothes-bringers then took away their clothes. This scheme (which was not complained of) was carried on until 1920, when a new washing scheme was started by the corporation on the recommendation of one of its committees. A public notice was issued by the corporation inviting persons to become its customers in a new enterprise, and setting out a new scheme under which a person desiring to benefit by it was to purchase a bag which would contain about 28 lbs. of clothes, bring the bag and its contents to the wash-house, and call for them when washed. Alternatively, customers could at a small additional charge have their bags collected and returned by the corporation's van. The bag and clothes were left with a person in the wash-house office who gave a receipt for them, and from that time until their return to the customer the bag and clothes passed entirely out of the customer's control, being washed, wrung, rough-dried and mangled by the employees of the corporation alone:—

Held, that the new scheme was not authorized by the Baths and Washhouses Acts, 1846 to 1878, and that the corporation must be restrained from continuing to carry it out.

THE defendant, the Metropolitan Borough of Fulham, was a statutory authority, not a common law corporation, but a corporation deriving its existence and powers exclusively under the London Government Act, 1899, and an Order in Council made in pursuance of that Act, and having power under the Baths and Wash-houses Acts, 1846 to 1878, to establish baths, wash-houses and open bathing places.

Under the Act of 1846 the operations which the corporation was carrying out were as follows: It supplied a wash-house in which there were 61 separate troughs or places at which persons coming to the wash-house had an opportunity of washing their clothes. Each place consisted of a trough in which there was cold water, and also a trough with some supply of hot water, and behind that there was an additional place in which boiling water was supplied and which performed the functions of a copper. The clothes were placed by the persons who brought them in the trough and washed, and were then placed in the boiling water and boiled. They were then

SARGANT
J.

1920

ATTORNEY-
GENERAL

v.

FULHAM
CORPORATION.
—

SARGANT
J.
1920
ATTORNEY-
GENERAL
v.
FULHAM
CORPORA-
TION.
—

brought out again and put into the trough, and blued and dealt with in the appropriate manner, and then—the only point at which any manual or artificial assistance was supplied by the corporation—the clothes were placed in a machine with what his Lordship called “the horrible hybrid name of a hydro-extractor,” but which he preferred to call a “wringer.” This wringer was filled by the person whose clothes had been washed down to that point, the clothes of several persons being placed in the wringer at once. There were 4 wringers in the room to 61 wash-tubs, so that there was 1 roughly to every 15, and it was a rule of the establishment that none of the persons who had washed clothes should be permitted themselves either to start or to stop the wringer, which revolved at a very great rate, but that the wringer should be started and stopped at their request by an attendant, employed by the corporation, in the room, and that attendant was the only attendant in the room who took part in any manual or mechanical operation for the purpose of helping in the washing of the clothes. After that the clothes were placed on clothes-horses which could be drawn out and pushed back into a long cupboard through which hot air was driven by machinery, and which performed the operation of drying the clothes. The clothes were put in and taken out by the customers themselves. Having got so far, the clothes were taken by the customers into an adjacent place where there were three or four ordinary mangles driven by power, and a separate mangle, called a “box mangle,” which was of rather a more elaborate construction and rather more difficult to work. There was in that place another attendant, whose duty it was to show the customers how the ordinary mangles could be brought into or put out of action, which was merely by moving a bar in one direction or the other, and who also took charge of the box mangle, because the working of that was a rather more difficult operation. When the clothes had been mangled the customers themselves took them away, so that, throughout the whole of the operations, the only help which was given to the 61 persons who could have been performing these operations by themselves was given by the one

person who controlled the starting and the stopping of the wringer, and also by the one person in the mangling room who controlled the box mangle and instructed the customers as to working the other mangles. The persons who came there for clothes-washing brought their own washing materials, their own soap, and their blue, and any other things that might be requisite, and the charges made to them were charges by the hour according to the time they occupied in using the facilities which had been provided for them at the wash-houses.

Matters were conducted in that way until a month or two before the trial of the action, and his Lordship expressed the opinion that that was the way in which these matters were ordinarily conducted by the authorities who had taken advantage of the Acts of 1846 and 1847.

The new system which was complained of in the action was started under and in pursuance of a recommendation of the Establishment Committee to the Council of the Fulham Corporation. That committee had appointed a sub-committee to consider the question, and the Establishment Committee brought up the following report: "We have very carefully considered an exhaustive report from a Sub-Committee appointed by us to investigate the matter, as to the desirability of this Council establishing the system of mechanical washing in this Borough. As a result, we are agreed that this system of washing is a practical one, and from a business point of view can be made a paying concern. We are very strongly of opinion that the Council, by adopting mechanical washing, will be conferring a lasting benefit upon all classes of the community, particularly those resident in the outlying parts of the Borough, who, owing to distance, are unable to take advantage of the facilities at present afforded. We also consider it very desirable, having regard to the housing shortage in the Borough, and the consequent congested arrangements in a very large number of houses, where several families have to live together, that some provision should be made in this respect. There is no private laundry in the district where this particular class of work is catered for, and

SARGANT
J.

1920

ATTORNEY-
GENERAL

v.

FULHAM
CORPORATION.
—

SARGANT
J.

1920

ATTORNEY-
GENERAL

v.

FULHAM
CORPORATION.
—

the charges made for general laundry work are much too high to relieve housewives of the greater portion of this laborious task." Then followed recommendations as to the installation of mechanical appliances suitable for the purpose, as to the expenditure of capital, as to the purchase of a horse and van, and so on, and then there were estimates as to the result of that expenditure as a business proposal. That recommendation was adopted by the Council, and a public notice was issued inviting persons to become customers of the Council. The notice was headed: "Important Notice. Household problem solved! A boon to housewives!!!" The notice then continued: "Recognising the difficulties at present experienced in connection with family washing, more particularly on account of housing congestion in the Borough, the Council has established a department at the baths and wash-houses, for the purpose of relieving Housewives to a great extent of this most laborious work." Then the scheme which was set out was that each person desirous of obtaining the benefit of the scheme had in the first instance to purchase a bag to contain her washing, which would contain approximately 28 lbs. of washing, and the cost of that bag was to be 2s. This person was to bring the bag containing the washing to the wash-house, and to leave it there, and then, after an appropriate time, was either to call for the bag and the contents, which had been washed up to a certain point, or, as an alternative, the person might ask for the bag and washing to be collected and to be delivered.

What happened to the bag and its contents when they were brought to the wash-house was as follows: They were delivered to a person in the office, who gave a receipt for them and, from that time forward until they were delivered back again to the person bringing them, the bag and its contents passed absolutely and entirely out of the control of the customer. The bag and its contents were taken into the first room, to the wash-house; the contents were emptied out of the bag, and placed, with the bag, in one of six compartments of one of two revolving mechanical washers. Materials for the purpose of washing were put in by the

engineer or wash-house man in charge of the mechanical washers, and the washers, revolving, practically performed the three operations which had previously been performed by the individual customers at the trough and the boiler behind it. After those operations had been so performed the clothes were taken into the next room, and afterwards to another hydro-extractor or wringer, where the same process was performed for them as in the wringers in the first room under the previous system, except that they were packed in the wringers—not by the customer, but by one of the attendants provided by the Council. Then, having been so wrung out, they were dried, either by being placed on clothes-horses in compartments similar to those in the first room, being not placed there by the customer but by the attendant, or, alternatively, they were placed in a revolving apparatus adapted for drying them by steam. When those operations had been performed the clothes were put back in the appropriate bag and were then ready either to be delivered by the van to the customer who took advantage of that method, or placed in the office to be called for by the customer who was ready personally to fetch the bag.

The present action was brought by the Attorney-General, at the relation of one Yapp, a ratepayer, and at the trial the plaintiff claimed: (1.) a declaration that the corporation was not entitled to establish or carry on the business of a laundry, or of collecting, washing and delivering, or washing, for householders or others resident in Fulham, linen or other fabrics, materials, or articles, and (2.) an injunction to restrain the corporation from establishing or carrying on any such business.

Tomlin K.C. and *J. G. Wood* for the plaintiff. The corporation is a statutory and not a common law one, and can only justify what it is doing by showing that its acts are within the Baths and Wash-houses Acts. It cannot invoke any such statutory authority, and is carrying on, *ultra vires*, the business of a laundry. The preamble to the Act of 1846 is: “Whereas it is desirable for the health, comfort and

SARGANT
J.
1920
ATTORNEY-
GENERAL
v.
FULHAM
CORPORATION.
—

SARGANT
J.

1920

ATTORNEY-
GENERAL

v.

FULHAM
CORPORATION.

welfare of the inhabitants of towns and populous districts to encourage the establishment therein of public baths and wash-houses and open bathing places." That preamble contemplates the provision of places to which the public may resort for the purpose of cleansing their persons or personally cleansing their own clothes. Sect. 4 provides that the expenses of carrying out the Act shall be charged upon the borough fund, and s. 21 provides for borrowing the moneys required on security of the borough fund or the rates. By s. 24 power is given to purchase or rent lands necessary for the purposes of the Act, and by s. 25 on any such lands the Council "may erect any buildings suitable for public baths and wash-houses, and as to such wash-houses either with or without open drying grounds, and make any open bathing places, and convert any buildings into public baths and wash-houses, and may from time to time alter, enlarge, repair, and improve the same respectively, and fit up, furnish, and supply the same respectively with all requisite furniture, fittings, and conveniences." That contemplates, as to wash-houses, only places to which the public can go to wash their own linen. Then s. 26 gives power to the public authority to enter into contracts for the necessary building, altering, repairing, and improving the public baths, washing-houses, and open bathing places, supplying water and light and fitting up, and so on. Under s. 27 power is given to contract to purchase or lease baths and washing-houses, but not lands. By s. 28 certain companies are authorized to supply water or gas for "public baths and wash-houses and open bathing-places," either without charge or on favourable terms. That could not be intended to apply to laundries. Sect. 31 relates to the sale and exchange of lands; and s. 32 to the sale of too expensive baths and the like. Sect. 33 provided that "the general management, regulation, and control of the public baths and wash-houses and open bathing places . . . shall, subject to . . . this Act, be as to any borough vested in and exercised by the Council." Then, s. 34 provides that the bye-laws "shall include such bye-laws for the management, use, and regulation" of the baths, etc., "and of the persons

resorting thereto respectively" and for determining the charges for the use of the same, power being given to impose penalties for the breach of any bye-law, whether by "officers or servants or by other persons." And bye-laws are to make sufficient provision for the purposes expressed in Sch. A. The provisions of Sch. A—which are, shortly, to secure due management and control, securing privacy and against accidents, against certain mixed bathing, against offensive language and behaviour—are obviously inapplicable to laundries. By s. 35 a printed copy or abstract of the bye-laws relating to wash-houses is to be put up near every washing-tub or trough, or every pair of them. Sect. 37 provides, by reference to Sch. B, for the charges to be made for the use of wash-houses, etc., maximum charges being fixed as to baths and wash-houses "for the labouring classes."

Nothing in the Act of 1846 justifies the running of a laundry business like this, and if the corporation is right in doing so, it is carrying on a laundry business with privileges which are not exercisable by ordinary laundrymen. The Baths and Wash-houses Act, 1847, does not help the corporation. The preamble, after referring to the Act of 1846, recites that "it is expedient to afford additional facilities for the establishment of public baths and wash-houses and open bathing places." Sect. 5 provides for the number of washing tubs or troughs for the labouring classes being larger than the number of tubs or troughs of a higher class. Sect. 7 provides for making charges which are not to exceed those referred to in a schedule which fixes maximum charges for the use of wash-houses for the labouring classes, but leaves the Council with a free hand as to charges in respect of wash-houses of any higher class. The whole basis of the charges is a time basis, having regard to the time occupied by persons in washing their own clothes. There is nothing enabling charges to be made for washing done by the corporation's employees. The Baths and Wash-houses Act, 1878 (41 Vict. c. 14), mainly relates to covered swimming baths, but s. 10 gives power to remove persons offending against bye-laws, and says that every bath, wash-house, or bathing place "shall be taken to be a public

SARGANT
J.

1920

ATTORNEY-
GENERALv.
FULHAM
CORPORATION.
—

SARGANT
J.

1920

ATTORNEY-
GENERAL

v.

FULHAM
CORPORATION.
—

and open place, so as to make offences against decency therein criminal offences"—a curious enactment if it is applicable to the customers of a laundryman. Sect. 11 gives power to refuse admittance to persons who have been convicted of offences against the bye-laws or decency. The Baths and Wash-houses Act, 1896 (59 & 60 Vict. c. 59), has no application here. The question now raised is mainly as to the construction of these Acts. The Council is carrying on two separate undertakings, for one of which it has the express authority of Parliament, but for the other of which, the laundry business, it has no authority at all, and, inasmuch as the Council is a purely statutory body, and has not the position and powers of a municipal or common law corporation, the running of the laundry business is just as ultra vires as the working of omnibuses is by a like corporation having only the statutory power to work tramways: *London County Council v. Attorney-General*. (1)

C. J. Mathew K.C. and *Sir Harry Courthope-Munroe K.C.* (*R. Roope Reeve* with them) for the defendant corporation. A laundry is a place where clothes are washed and dressed. The corporation only does the preliminary work, which is part of a laundryman's work. The doctrine of ultra vires, as applied to a statutory corporation, must not be unreasonably understood and applied, and whatever may fairly be regarded as incidental to, or consequential upon, those things which the Legislature has authorized, ought not, unless expressly prohibited, to be held by judicial construction to be ultra vires: *Attorney-General v. Great Eastern Ry. Co.* (2) The preamble to the Act of 1846 contemplates washing of persons' clothes and persons as being for the health, comfort and welfare of the inhabitants of towns and districts, and washing of clothes by a corporation for, instead of by, the owners of the clothes is something incidental to, or consequential upon, what is authorized and not prohibited by these Acts. It cannot be said, with any reason, that the Act of 1846 restricts the corporation to the employment of such utensils, materials, or other means as there were then in use.

(1) [1902] A. C. 165.

(2) (1880) 5 App. Cas. 473, 478.

There is no practical difference between the case of a woman bringing her clothes to the wash-house and washing them there and the case of her bringing the clothes in a bag and having them washed for her—in either case the operation facilitates washing which is desirable for the health, comfort and welfare of the inhabitants. Sect. 25 of the Act of 1846 expressly authorizes the supplying of “conveniences,” and that would include the supply of automatic wringing machines, and a better form of a wash tub or trough. The corporation is not forbidden to take advantage of modern improvements in utensils, machinery, or methods. Sect. 26 empowers the corporation to supply “materials,” and s. 34 contemplates the employment of “servants” by the corporation. The Act of 1847 says that “it is expedient to afford additional facilities,” and it contemplates something more—namely, facilities, not only for the labouring classes but for other classes. For the latter the corporation may provide “wash-houses” of any higher class and may make the class using them pay such charges as it thinks fit. The corporation is merely providing a wash-house with greater facilities for washing, and it is immaterial that the washing is done by servants of the corporation, and not by the clothes-bringers. This is not a commercial venture, and it is cheaper to carry on the new scheme than to build new wash-houses to supply the needs of those living in the outskirts of the borough.

[They also referred to *Attorney-General v. Mersey Ry. Co.* (1)]

SARGANT J. This is an action by the Attorney-General, at the relation of the ratepayers of Fulham, against the municipal borough of Fulham, to restrain it, to use a short phrase, from carrying on a laundry, or something in the nature of a laundry.

In considering what the corporation may do, and what it may not do, I have to take as my guiding authority the words of Lord Selborne L.C. in *Attorney-General v. Great Eastern Ry. Co.* (2) He says: “I assume that your Lordships will not now recede from anything that was determined in *Ashbury*

SARGANT
J.

1920

ATTORNEY-
GENERAL

v.
FULHAM
CORPORATION.
—

SARGANT
J.

1920

ATTORNEY-
GENERAL

v.

FULHAM
CORPORATION.

Ry. Co. v. Riche. (1) It appears to me to be important that the doctrine of ultra vires, as it was explained in that case, should be maintained. But I agree with James L.J. that this doctrine ought to be reasonably, and not unreasonably, understood and applied, and that whatever may fairly be regarded as incidental to, or consequential upon, those things which the Legislature has authorized, ought not (unless expressly prohibited) to be held, by judicial construction, to be ultra vires." That recognizes that in every case it is for a corporation of this kind to show that it has affirmatively an authority to do particular acts; but that in applying that principle, the rule is not to be applied too narrowly, and the corporation is entitled to do not only that which is expressly authorized but that which is reasonably incidental to or consequential upon that which is in terms authorized. And it is, of course, for the defendant corporation to point out the authority under which it has acted in what it has done. [His Lordship stated the facts, as above set out, including the new laundry scheme, and continued:] Now that is the new scheme and the method of carrying it out, and the question I have to consider is this, whether that scheme is authorized by the Baths and Wash-houses Act, 1846, and the Baths and Wash-houses Act, 1847.

It is quite clear that the new scheme of the corporation is not directly authorized by those Acts, but I have also to see, whether, although it is not authorized in terms by the Acts, it is something which in the language I have cited, "may fairly be regarded as incidental to or consequent upon those things which the Legislature has authorized." For that purpose I have to look at the two Acts. I will not go in great length through them. My attention has been called to all the material sections by Mr. Tomlin or Mr. Mathew, but it is important to notice the preamble to the Act of 1846, which is as follows: "Whereas it is desirable for the health, comfort, and welfare of the inhabitants of towns and populous districts to encourage the establishment therein of public baths and wash-houses and open bathing places." So that the scheme

of the Act appears to be to give washing facilities to persons who are not able to provide for themselves places where they may cleanse themselves or their clothes. Then there are a number of provisions with regard to baths, and so on, which I need not refer to, and then comes the power to establish the wash-houses. By s. 25 the Council may from time to time, on lands which they have provided for the purpose, make any open bathing places, "erect any building suitable for public baths and wash-houses, and as to such wash-houses either with or without open drying grounds, and make any open bathing places, and convert any buildings into public baths and wash-houses, and may from time to time alter, enlarge, repair, and improve the same respectively, and fit up, furnish, and supply the same respectively with all requisite furniture, fittings, and conveniences." That word "conveniences" has been much relied on by counsel for the corporation.

SARGANT
J.

1920

ATTORNEY-
GENERALv.
FULHAM
CORPORATION.
—

Then, by s. 26 the Council is empowered to enter into contracts with persons to alter, enlarge, repair and improve the public baths and wash-houses, to supply the same with water, and lighting, and to fit up the same, and to furnish any materials and things "and for executing and doing any other works and things necessary for the purposes of this Act." Then, by s. 34 the Council is given power to make "bye-laws for the management, use, and regulation of the public baths and wash-houses, and open bathing-places, and of the persons resorting thereto respectively," and for the breach of the bye-laws fines may be imposed. Then, by s. 35 it is provided that: "A printed copy or sufficient abstract of the bye-laws relating to the use of the baths and open bathing places respectively shall be put up in every bathroom and open bathing place respectively; and a printed copy or sufficient abstract of the bye-laws relating to the use of the washhouses shall be put up in some convenient place near every washing tub or trough, or every pair of washing tubs or troughs, in every wash-house." Then, by Sch. A to the Act, which relates to the bye-laws which can be made under the Act, the bye-laws may be "for securing

SARGANT
J.

1920

ATTORNEY-
GENERAL

v.

FULHAM
CORPORATION.
—

that the baths and wash-houses and open bathing-places shall be under the due management and control of the officers, servants, or others appointed or employed in that behalf by the council or commissioners. For securing adequate privacy to persons using the baths and wash-houses and open bathing-places, and security against accidents to persons using the open bathing-places."

That, I think, is a summary of the more important provisions of the Act of 1846.

Then, by the Baths and Wash-houses Act, 1847, after reciting that "it is expedient to afford additional facilities for the establishment of public baths and wash-houses and open bathing places," it is provided, by s. 5, that "the number of washing tubs and troughs for the labouring classes in any building or buildings under the management of the same Council . . . shall not be less than twice the number of the washing tubs or troughs of any higher class, if but one, or of all the higher classes if more than one, in the same building or buildings." Then, in a schedule to the Act, which regulates the charges which may be made, the charges in the case of wash-houses for the labouring classes are these: "Every wash-house to be supplied with conveniences for washing and drying clothes and other articles. For the use by one person of one washing tub or trough, and of a copper or boiler (if any), or, where one of the washing tubs or troughs shall be used as a copper or boiler, for the use of one pair of washing tubs or troughs, and for the use of the conveniences for drying: For one hour only in any one day, any sum not exceeding one penny. For two hours together, in any one day, any sum not exceeding threepence"; and there are certain other words which I need not refer to. Then, under the Baths and Wash-houses Act, 1878, there is power to remove persons who are offending against the bye-laws, and power to refuse admittance to anybody who commits offences against decency.

Now what is the effect of that legislation? It appears to me to be quite clear that the whole scheme is to afford facilities for persons who have not such facilities themselves

and cannot pay for them, so that they may, so far as the wash-houses are concerned, do their own washing. Throughout there is no sort of suggestion, as far as I can see, that anything is to be provided for those persons except facilities for their doing the work themselves. As regards the word "conveniences," in s. 25 of the Act of 1846, and the word "materials," in s. 26 of the same Act, on which great stress was laid, it seems to me that those words are merely limited to conveniences and materials for the purposes of the Act; and, the purposes of the Act being clearly, in my judgment, the provision of facilities for persons to do their own washing, the words "conveniences" and "materials" must be limited to that.

Under the new system which has been inaugurated what has been provided for the persons who become customers is, in my judgment, not facilities for doing their own washing, but the washing itself. It seems to me that, in view of the fact that the control of the articles in question is entirely parted with, that the articles are washed up to a certain point absolutely and entirely irrespective of the labours or attention or care of the customers, and that the articles when that process has been gone through are redelivered in their semi-finished state to the customers, it is impossible to say that the Council have been doing anything else except the washing of the clothes down to a certain point for the particular customers. Now is that something which may fairly be regarded as incidental to or consequential upon the provision of facilities for washing? In my judgment, it is not. It appears to me to be a completely different enterprise, namely the business of washing to a particular degree or stage. It is said indeed—although I have no evidence either one way or the other—that no laundries do less than the complete operation of washing, including certain processes which are not gone through by the Council. But on the other hand it is said that there are laundries which do perform substantially the same operation as and no more than that performed by the Council. I do not think, however, that I have to consider whether that is so, one way or another.

SARGANT
J.

1920

ATTORNEY-
GENERALv.
FULHAM
CORPORATION.
—

SARGANT
J.

1920

ATTORNEY-
GENERAL
v.
FULHAM
CORPORATION.
—

It is clear to me that what the Council is doing is not only the carrying on of a business of a kind, but something—which is the real point—which is not ancillary to or consequential upon that which it is entitled to do under these Acts of Parliament. It has been contended that what is being done is not a business or the carrying on of a business, and cannot be regarded as such, because it has not been carried on at a profit. This is of no consequence, though I am clear, not only that it has not been carried on at a profit, but that it has been carried on under arrangements which will result in a very substantial loss; and it has been so carried on that opportunities have been given for the performance of operations for classes that I do not think really were intended to be benefited by the Acts in question. One thing has struck me most particularly, that the services of the horse and van in the delivery and collection of the clothes are done at prices which are hopelessly and utterly unremunerative. In the witness box the manager stated that the number of persons who would be served by the horse and van under that scheme could not amount to more than 250; and that that would be the limit of their capacity; and, as the charge for that is 3*d.*, it would follow that the weekly sum which would be earned in that way could not amount to more than I think 2*l.* 3*s.* 6*d.* It is clear, on the other hand, that the cost of the horse and van, and the van-man and the boy, dealing with those on the basis of the wages at the time when the scheme was inaugurated—and I am told that the wages have risen since—would be well over 6*l.* a week. So that, substantially, the service is being performed at about half, or probably just a little less than half of the cost to the Council. That is an instance I think, although it is immaterial for the present purpose, of the light-hearted way in which operations are conducted by persons who have not their own pockets to consider, but who have behind them what they regard as the unlimited or nearly unlimited purse of the ratepayers.

However, that is not the real point on which the matter turns; the matter turns on this, whether or not the Council

has, either expressly or impliedly, power to conduct the operation which it is conducting. In my judgment, neither expressly nor impliedly, under the Acts on which it relies, has it that power, and accordingly the plaintiff is entitled to succeed.

There will therefore be a declaration that the defendant corporation is not entitled to carry on any enterprise which carries into execution the report of the Committee, or which involves the total or partial washing of clothes for others by the defendant corporation, as distinguished from facilities for enabling others to come to the wash-house to wash their clothes; and there will be an injunction to restrain the defendant corporation, its officers, servants and agents, acting in contravention of this declaration. The Council must pay the costs of the action.

Solicitors for the plaintiff: *Torr & Co.*

Solicitor for the defendant corporation: *W. Townend, Town Clerk of Fulham.*

F. E.

SARGANT
J.
1920
ATTORNEY-
GENERAL
v.
FULHAM
CORPORATION.
—

NORTH METROPOLITAN ELECTRIC POWER SUPPLY
COMPANY *v.* STOKE NEWINGTON CORPORATION.

P. O.
LAWRENCE
J.

[1919. N. 985.]

1920
Nov. 18, 19;
Dec. 1, 2, 16.
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Emergency Legislation—Contract—Rise in Cost of Coal and Labour—"Alteration of trade conditions occasioned by the war"—"Serious hardship"—Jurisdiction—Contract annulled—Courts (Emergency Powers) Act, 1917 (7 & 8 Geo. 5, c. 25), s. 1, sub-s. 1—Courts (Emergency Powers) Act, 1919 (9 & 10 Geo. 5, c. 64), s. 1, sub-s. 1 (a)—Costs.

Sect. 1, sub-s. 1, of the Courts (Emergency Powers) Act, 1917, as amended by s. 1, sub-s. 1 (a), of the Courts (Emergency Powers) Act, 1919, provides that where, upon an application by any party to a contract entered into before January 1, 1917, the Court is satisfied that, "owing to the prevention or restriction of, or the delay in, the supply or delivery of materials, or the diversion or insufficiency of labour, or the shortage of shipping, or the alteration of trade conditions, occasioned by the present war, the contract cannot be enforced according to its terms without serious hardship" the Court may, after considering all the circumstances

P. O.
LAWRENCE
J.

1920

NORTH
METRO-
POLITAN
ELECTRIC
COMPANY
v.
STOKE
NEWINGTON
CORPORATION.

of the case and the position of all the parties to the contract, and any offer which may have been made by any party for a variation of the contract, suspend or annul the contract on such conditions (if any) as the Court may think fit.

The plaintiffs under contracts comprised in four pre-war agreements, not determinable by them, were bound to supply electrical energy in bulk to the defendants upon the terms and on the scale of charges specified in the agreements, and in December, 1919, applied under the section to the Court for relief on the ground that owing to the alteration of trade conditions caused by the war the agreements could not be enforced according to their terms without inflicting serious hardship upon them. Before applying to the Court the plaintiffs made an offer to the defendants to vary the agreements by adding thereto a coal clause, the terms of which were fair, but the defendants did not accept the offer :—

Held, that the words “alteration of trade conditions” upon the true construction of the section were not limited to an alteration brought about by matters other than those previously specified in or expressly excluded from the section but extended to an alteration brought about by the rise in the cost of materials and labour occasioned by the war.

Held, also on the evidence, that the rise since 1914 in the cost of coal and labour had caused an alteration in the trade conditions under which the plaintiffs manufactured and supplied electrical energy, and that such alteration was occasioned by the war within the meaning of the section.

Held further, on the evidence, that owing to this alteration of trade conditions occasioned by the war the agreements could not be enforced according to their terms without inflicting serious hardship upon the plaintiffs, and therefore that under all the circumstances the plaintiffs were entitled to have the agreements annulled.

Held also, but without laying down any general rule, that as the plaintiffs had come to the Court for relief from their contractual obligations, and as the defendants had not acted unreasonably, it being their duty in the interests of their ratepayers and consumers to maintain the agreements, the plaintiffs must pay the costs of the application.

The principles on which the Court should act in exercising the jurisdiction conferred on it by the section considered.

Quære whether the offer for a variation of a contract contemplated by the section is not an offer which has been made before an application is launched under the section or at any rate before the hearing of the application.

ADJOURNED SUMMONS.

This was an application by the plaintiffs (hereafter called the company) for relief under s. 1, sub-s. 1, of the Courts (Emergency Powers) Act, 1917, as amended by s. 1, sub-s. 1 (a), of the Courts (Emergency Powers) Act, 1919, in respect of

certain contracts for the supply of electrical energy in bulk entered into by them with the defendant corporation (hereafter called the council).

The contracts were comprised in four agreements dated respectively December 31, 1904, January 16, 1906, March 9, 1908, and October 24, 1911, and by them the company bound themselves to supply the council and the council bound themselves to take from the company all such electrical energy as they should require for any purpose (except as therein mentioned) upon certain terms and conditions, and the council agreed to pay for this supply according to the scale of charges therein specified. The agreements could be determined by the council in March, 1927, on giving a notice in that behalf as therein provided, but the company had no power to determine them.

Owing to the rise from 1914 and onwards in the cost of coal and labour the company had been and were supplying electrical power to the council under the agreements at a yearly increasing loss and in 1919 applied to the council, both before and after the passing of the Courts (Emergency Powers) Act, 1919, to vary the terms of the agreements and offered a coal clause, which they alleged would work very fairly under which the council would pay for the current supplied to them at a price per unit varying with the cost of coal for the time being. The company, being unable to obtain a definite reply to this offer, issued a summons in December, 1919, under the above Acts for an order that the agreements might be suspended or annulled, or with the consent of the parties amended, as from such date as the Court might think fit on the ground that, owing to the alteration of trade conditions occasioned by the war, the agreements could not be enforced according to their terms without inflicting serious hardship upon them. It was admitted that the agreement of March 9, 1908, was not material to the present application and it was not read, but the agreements of December 31, 1904, January 16, 1906, and October 24, 1911, were put in evidence. The other material facts sufficiently appear in the arguments and judgment.

P. O.
LAWRENCE
J.

1920
NORTH
METRO-
POLITAN
ELECTRIC
COMPANY
v.
STOKE
NEWINGTON
CORPORATION.
—

P. O.
LAWRENCE
J.

1920

NORTH
METRO-
POLITAN
ELECTRIC
COMPANY
v.
STOKE
NEWINGTON
CORPORATION.

The Courts (Emergency Powers) Act, 1917, s. 1, sub-s. 1, enacts: "Where, upon an application by any party to a contract for the construction of any building or work or for the supply of any materials for any building or work entered into before the fourth day of August, nineteen hundred and fourteen, the court is satisfied that, owing to the prevention or restriction of, or the delay in, the supply or delivery of materials, or the diversion or insufficiency of labour, occasioned by the present war, the contract cannot be enforced according to its terms without serious hardship, the court may, after considering all the circumstances of the case and the position of all the parties to the contract and any offer which may have been made by any party for a variation of the contract, suspend or annul the contract or stay any proceedings for the enforcement of the contract or any terms thereof or any rights arising thereunder on such conditions (if any) as the court may think fit."

The Courts (Emergency Powers) Act, 1919, s. 1, sub-s. 1, enacts: "Section 1 of the Courts (Emergency Powers) Act, 1917, which confers on the court power to suspend and annul certain contracts shall have effect as if—(a) for sub-section (1.) thereof the following sub-section were substituted: 'Where, upon an application by any party to a contract (including a contract confirmed by Act of Parliament or Order having the force of an Act) entered into before the first day of January, nineteen hundred and seventeen, the court is satisfied that, owing to the prevention or restriction of, or the delay in, the supply or delivery of materials, or the diversion or insufficiency of labour, or the shortage of shipping, or the alteration of trade conditions, occasioned by the present war, the contract cannot be enforced according to its terms without serious hardship, the court may, after considering all the circumstances of the case and the position of all the parties to the contract and any offer which may have been made by any party for a variation of the contract, suspend or annul, or with the consent of the parties amend as from such date as the court may think fit, or stay any proceedings

for the enforcement of, the contract or any term thereof or any rights arising thereunder on such conditions (if any) as the court may think fit. . . . ”

P. O.
LAWRENCE
J.

1920

NORTH
METRO-
POLITAN
ELECTRIC
COMPANY
v.
STOKE
NEWINGTON
CORPORA-
TION.

Tyldesley Jones K.C. and *W. Craig Henderson* for the plaintiffs. Under the Special Acts of the company the Borough of Stoke Newington is within the statutory limits of their area of supply. We have to prove, (1.) that the abnormal rise in the cost of coal and labour since 1914 is an alteration of trade conditions within the meaning of the section, (2.) that this alteration has been occasioned by the war, and (3.) that to enforce the terms of the agreements will inflict serious hardship upon us. We submit that these propositions are established by our evidence. As to the law, there is no direct authority. In *Wauters v. Association Internationale d'Agences* (1), a decision under the Act of 1917, it was held, in an action for damages for non-delivery of goods under a contract, that a mere rise in the price of goods which could be obtained in the open market was not a "serious hardship." In *Inholder's Company v. Wainwright* (2) a building contract was suspended as long as building was prohibited, and where a contract becomes impossible of performance the proper course is to annul or determine it: *Metropolitan Water Board v. Dick, Kerr & Co.* (3); *Schofield & Co. v. Maple Mills, Ltd.* (4) A pecuniary loss may amount to a serious hardship: *Metropolitan Electric Supply Co. v. London County Council* (5); *Electrical Pavilions (Marble Arch) Ltd. v. Lorden.* (6) We are now making an annual loss of about 2622*l.* on the supply of current to the defendants under the agreements and, inasmuch as it may be permanent, because we have no power to determine the agreements, that is serious hardship in respect of which we are entitled to relief. As to our offer to vary the agreements, although it was made before the Act of 1919 was passed, it has never been withdrawn and we adhere to it;

(1) [1918] W. N. 267; (1918) (3) [1918] A. C. 119.

34 Times L. R. 577. (4) (1918) 34 Times L. R. 423.

(2) [1917] W. N. 172. (5) [1919] 1 Ch. 357.

(6) [1918] 2 Ch. 399.

P. O.
LAWRENCE
J.

1920

NORTH
METRO-
POLITAN
ELECTRIC
COMPANY

v.
STOKE
NEWINGTON
CORPORATION.

if necessary we now repeat it. Our financial position outside this particular transaction is wholly irrelevant. Our evidence shows that the coal clause is fair and reasonable and it has been refused. By ss. 19 and 20 of the Electric Lighting Act, 1882, we are prohibited from giving an undue preference : *Att.-Gen. v. Long Eaton Urban Council* (1) ; *Att.-Gen. v. Hackney Corporation*. (2) We have proved serious hardship and are therefore entitled to have the agreements suspended or annulled. Annulment will not land the defendants in difficulties, because they can obtain a supply of current from other undertakers, or they can demand it of us under our Special Acts and we are bound to supply at a fair price, which can be settled by arbitration if the parties cannot agree.

Jenkins K.C. and *S. J. Merlin* for the defendants. We contend, first, that on the true construction of the section, soaring prices are not an alteration of trade conditions within the meaning of the Act ; secondly, that if they are, the alteration has not been occasioned by the war ; and thirdly, that if the alteration has been occasioned by the war, it is not a case of serious hardship. But if the Court is against us on the first three points then we say, admitting that the coal clause was an offer, that under the circumstances no reasonable offer has been made and that the defendants should have an opportunity of considering a fair offer. The Legislature did not intend that the mere rise in the cost of wages and fuel was to be taken into consideration by the Court as an alteration in trade conditions. It was not the war but the demand of labour to have a larger share in the product of their labour that caused the rise, although, no doubt, it was stimulated by the war. But the labour unrest had arisen before the war. The section means an alteration of trade conditions caused other than by cost of labour and fuel, and the words "occasioned by the war" govern all the preceding words. Wages have gone up because of the increased cost of living, and this rise which is still going on is no longer caused by the war but is due to the demands of

(1) [1914] 2 Ch. 251.

(2) [1918] 1 Ch. 372.

labour. As to hardship : Admitting that serious hardship may include some pecuniary loss, mere pecuniary loss is of itself not sufficient. It must be a pecuniary loss that means ruin to the party affected having regard to all the circumstances of the case. It is not a serious hardship that this particular contract entails some pecuniary loss, especially as the plaintiffs have a large and prosperous business and have paid good dividends. The Court must look at all the circumstances and consider what is fair between the parties. As to their offer of the coal clause, it is wholly inadequate. They offer us only the same terms as they would give to their other customers. We are willing to make some concession, and suggest that we pay them an additional sum of 372*l.* per annum, being one half of the loss of 744*l.* on their works costs for the year 1919.

P. O.
LAWRENCE
J.
1920
NORTH
METRO-
POLITAN
ELECTRIC
COMPANY
v.
STOKE
NEWINGTON
CORPORATION.

[P. O. LAWRENCE J. Under the section the Court has power with the consent of the parties to modify or amend the terms of the contract. Are the parties willing that I should do so ?]

Tyldesley Jones K.C. The plaintiffs are quite willing that the Court should act as arbitrator under the section and say what is fair and reasonable.

Jenkins K.C. The defendants cannot agree to that suggestion. The Court must consider the position of the parties and the conduct of the defendants in refusing the offer. As to the provisions of the Electric Lighting Act, 1882, they have no bearing on and do not apply to this case.

Tyldesley Jones K.C. in reply. Some of our other customers have voluntarily conceded to us the coal clause and it is working very fairly. We ask for an annulment of the agreements.

Cur. adv. vult.

Dec. 16. P. O. LAWRENCE J. In this case the company are applying to the Court for relief under s. 1, sub-s. 1, of the Courts (Emergency Powers) Act, 1917, as amended by s. 1, sub-s. 1 (a), of the Courts (Emergency Powers) Act, 1919, in respect of certain contracts for the supply of electrical energy

P. O.
LAWRENCE
J.

1920

NORTH
METRO-
POLITAN
ELECTRIC
COMPANY
v.
STOKE
NEWINGTON
CORPORATION.
—

entered into by them with the council. The contracts are comprised in four agreements. [His Lordship shortly referred to the four agreements and continued:] The company allege that they are now making a heavy loss upon such supply instead of making a profit, as they expected to do when they entered into the agreements, and that the agreements cannot be enforced according to their terms without serious hardship to them. They further allege that this loss has been brought about owing to the alteration of trade conditions occasioned by the war, and they ask the Court to annul the agreements. Before the jurisdiction of the Court to annul the agreements arises, the Court according to the express terms of the section must be satisfied, first, that there has been an alteration of trade conditions affecting the manufacture and supply of electrical energy; secondly, that such alteration has been occasioned by the war; and thirdly, that owing to such alteration the enforcement of the agreements according to their terms would inflict a serious hardship upon the company.

The company maintain that the trade conditions since the war are entirely different from the trade conditions which prevailed before the outbreak of the war. In support of this contention they have proved that the price of coal has risen from 17s. 6d. a ton in 1914 to 58s. 10 $\frac{3}{4}$ d. per ton at the present time, and that the wages of engine drivers have risen from 7 $\frac{1}{2}$ d. per hour in 1914 to 2s. per hour at the present time. The company contend that the big rise in the cost of coal and labour, which rise they say renders it impossible for them to manufacture and supply the electrical energy under the agreements except at a heavy loss, constitutes an alteration of trade conditions within the meaning of the section. The council do not dispute that the rise in cost of coal and labour has taken place but deny that such rise constitutes an alteration in the trade conditions within the meaning of the section. Mr. Jenkins contends that owing to the collocation in which the words "alteration of trade conditions" are found in the section, such words ought to be construed so as not to apply to an alteration in the trade conditions brought about by

anything which is specifically mentioned in or expressly excluded from the earlier part of the section. He further contends that as the physical impossibility or difficulty of obtaining materials and labour is specifically mentioned the maxim *Expressio unius est exclusio alterius* applies and the increase of the cost of materials and labour is excluded. I cannot accede to this argument. It is not unimportant to remember the history of the section as it now stands. In the Act of 1917 the section was confined to contracts for the construction of buildings or works and for the supply of material for buildings or works, and the words "alteration of trade conditions" did not occur. By the Act of 1919 the section was extended to all contracts and the words "or the alteration of trade conditions" were added. Bearing in mind that the words dealing specifically with the impossibility or difficulty of obtaining material and labour which occur in both Acts were originally only applicable to the limited class of contracts mentioned in the Act of 1917, and that, when the operation of the section was enlarged so as to include all contracts, these words were retained but the words "or the alteration of trade conditions" were added, I am of opinion that the Court (especially where, as in this case, it is dealing with a contract which has nothing to do with the construction of or the supply of materials for buildings or works) ought not to cut down the ordinary and natural meaning of the added words so as to exclude from the section any contract the hardship in enforcing which is brought about by an alteration in the trade conditions owing to the rise in the cost of materials and labour. But quite apart from the history of the section I am of opinion that the construction suggested by Mr. Jenkins is altogether too narrow and that the specific mention of the impossibility or difficulty of obtaining materials or labour which precedes the words "the alteration of trade conditions" do not compel the Court as a matter of construction to attribute the restricted meaning sought to be placed upon the latter by Mr. Jenkins. He did not deny that in the ordinary or popular acceptation of those words they would include alteration of conditions

P. O.
LAWRENCE
J.

1920
NORTH
METRO-
POLITAN
ELECTRIC
COMPANY
v.
STOKE
NEWINGTON
CORPORATION.
—

P. O.
LAWRENCE
J.

1920

NORTH
METRO-
POLITAN
ELECTRIC
COMPANY
v.
STOKE
NEWINGTON
CORPORATION.
—

brought about by the soaring of prices of material and labour. A trader does not in my opinion carry on his trade under the same conditions after an abnormal rise in cost of materials and labour as the conditions under which he carried it on before such rise. In the result therefore I hold that the rise which has been proved to have taken place in the cost of coal and in the wages of the engine drivers has brought about an alteration in the trade conditions under which the company manufacture and supply electrical energy within the meaning of the section.

The next question to be determined is whether this alteration of the trade conditions has been occasioned by the war. In solving this question I am greatly assisted by the evidence of Mr. Gilbert Stone, who has made an affidavit on behalf of the council. This affidavit was professedly filed in order to prove that had it not been for special legislation passed during the war and for the control exercised by the Government in consequence of such legislation the price of coal to electricity undertakings such as the company's would have risen much higher than it has risen in fact. Incidentally I think Mr. Stone proves conclusively that the rise in the price of coal has been occasioned by the war. [His Lordship then summarised Mr. Stone's evidence at some length and held that it conclusively proved that the abnormal rise in the price of coal and labour was occasioned by the war and proceeded :] But Mr. Jenkins argues that although the original rise in the cost of coal and labour may have been caused by the shortage of men, the scarcity of transport, and the large demand of coal for the manufacture of munitions, yet at the present time, when these obstacles are all removed and it is found that the cost of coal and labour are not only maintaining their high level but are still on the upward trend, it cannot be said that the alteration in the trade conditions which is now proved to exist is occasioned by the war. Here again the affidavit of Mr. Stone in my opinion affords the answer—namely, that the purchasing value of the pound has fallen owing to the war and that that is really the main cause of the demand for higher wages and of the high prices which

are now obtaining. In my opinion it cannot be doubted that the depreciation in the purchasing value of the pound has been occasioned by the war. In the result I have come to the conclusion that the alteration of the trade conditions under which the company are now manufacturing and supplying electrical energy is occasioned by the war within the meaning of the section.

The next question to be determined is whether owing to this alteration in the trade conditions the agreements in question can be enforced according to their terms without inflicting serious hardship on the company. [His Lordship then quoted from the affidavit of Mr. Murray, the engineer of the plaintiffs, facts and figures which went to show that the sum of 2622*l.* approximately represented the present annual loss to the company in the manufacture and supply by them of electrical energy to the council under the agreements and continued:] The council, in the first instance, dispute that any loss at all is occasioned to the company in furnishing the supply. They point out that the figures deposed to by Mr. Murray are only estimates, and further that, even if they are accepted, the current supplied by the company to the council bears only a very small proportion to the total current supplied to all the company's customers. They contend that a considerable addition to or deduction from the number of units produced can generally be made without any large increase or decrease in the total works charges, and that in the present instance no actual loss is incurred, because only such a small fraction as 7.480th of the company's total supply is involved. The conclusion I have arrived at upon this point after considering all the evidence is that although there is great force in the council's contention, and that Mr. Murray has probably placed the actual annual loss of the company under the agreements at too high a figure, yet after all the only practical way in which the company can ascertain whether the manufacture and supply of a given quantity of current supplied to one of their customers is being carried on at a profit or loss is by attributing to the current supplied to that customer the proper proportion of the cost

P. O.
LAWRENCE
J.

1920

NORTH
METRO-
POLITAN
ELECTRIC
COMPANY

v.
STOKE
NEWINGTON
CORPORATION.

P. O.
LAWRENCE
J.

1920

NORTH
METRO-
POLITAN
ELECTRIC
COMPANY
v.
STOKE
NEWINGTON
CORPORATION.
—

of the total current supplied by the company to all their customers. Judged on this basis I am clearly of opinion that if the company are held bound by the scale of charges fixed in the agreements the company can only supply the electrical energy under the agreements at a heavy annual loss. Mr. Jenkins however contends that the scale of charges agreed to by the company was the result of cutting of prices owing to competition, and that the price was deliberately fixed by the company at such a low figure that the company was inevitably bound to suffer a loss, and that any hardship inflicted on the company in this respect was not caused by an alteration of the trade conditions but was occasioned by the company having agreed to too low a scale of charges. In my opinion the evidence adduced by the company does not bear out this contention. The company were no doubt prepared to suffer some loss during the earlier period of the currency of the agreements whilst the council were developing their system for the distribution of the electrical energy purchased by them and until the demand of the council's customers had reached substantial proportions. The company however confidently anticipated that as time went on the council's demand for current under the agreements would increase to such an extent as to render the supply profitable to the company. Mr. Murray's affidavit shows that on the basis of apportioning the proper proportion of the company's works' costs (i.e., cost of coal and labour) to the council, the company had in 1914 already arrived at the position that the payments by the council exceeded by 1182*l.* the proportion of the company's then works' costs attributal to the current so applied, and that if in addition the proper proportion of the capital charges were taken into account there had been a progressive diminution in the net loss to the company under the agreements until in 1914 such net loss amounted to not more than 289*l.* Judging by the figures given in evidence the company were in 1914 justified in anticipating a profit in the near future. In my judgment the inference is inevitable that, if trade conditions had not altered, the company would by now have been making a substantial

profit under the agreements, as the council's demand for electrical energy has steadily increased and is now nearly double what it was in 1914. A further point has been taken by the council—namely, that the company have for a considerable period been supplying the electrical energy to the council by means of a supply from the Hackney Borough Council, which supply the company have obtained for a price arrived at by taking the cost of the coal plus 10 per cent., which price is considerably less than the cost of production at the company's power station based upon Mr. Murray's figures. Consequently, they say that those figures ought not to be accepted as showing the cost of the production of the current supplied to the council. This contention is in my judgment completely answered by Mr. Murray's second affidavit, where he points out that the supply under the agreement with the Hackney Borough Council is a reciprocal one, and that the agreement for such supply was made in the joint interests of both contracting parties in order to reduce their total production cost and to safeguard the supply. In my judgment the evidence shows that Mr. Murray was right in ignoring the cost of the Hackney supply when calculating the cost to the company of the electrical energy supplied to the council.

In my judgment the heavy pecuniary loss to the company in carrying out the terms of the agreements, which agreements they are unable to determine, amounts to a serious hardship within the meaning of the section. In these circumstances I have come to the conclusion that owing to the alteration of trade conditions occasioned by the war the agreements cannot be enforced according to their terms without inflicting serious hardship upon the company. That being so, the preliminary conditions of the section are satisfied and the Court has jurisdiction to annul the agreements in question. I will therefore now proceed to consider whether the Court ought to exercise such jurisdiction in this case. The section, although stating in general terms what the Court is to take into consideration in exercising its jurisdiction, does not state upon what principles the jurisdiction is to be exercised. The

P. O.
LAWRENCE
J.

1920

NORTH
METRO-
POLITAN
ELECTRIC
COMPANY
v.

STOKE
NEWINGTON
CORPORA-
TION.
—

P. O.
LAWRENCE
J.

1920

NORTH
METRO-
POLITAN
ELECTRIC
COMPANY

v.

STOKE
NEWINGTON
CORPORATION.

exercise of this jurisdiction is left entirely at large. I cannot help feeling much embarrassed by having to exercise a power so arbitrary in its nature. Apparently it is left to the Court (when once it is satisfied that the case is one which comes under the section) to decide whether it is fair that a particular contract should be allowed to continue or should be annulled or suspended. Different minds may of course take different views as to what is fair in any particular case. I believe that this is the first occasion on which the Legislature has conferred such an arbitrary power upon the Court. It must however be remembered that this power is an emergency power conferred upon the Court only because of the great dislocation of almost all commercial transactions caused by the greatest war in which England has ever been engaged. I gather therefore that it was the intention of the Legislature that the Court should in all cases falling within the section do what it conceives to be fair as between man and man. It is obvious from the nature of the jurisdiction thus conferred that it would be highly inexpedient for any judge to lay down any general principles upon which the Court ought to act in all cases, and I shall not attempt to do anything of the kind in the present case. All my remarks therefore must be taken to have reference only to the particular facts before me. It is not disputed that in the present case any mere suspension of the agreements in question or any stay of proceedings to enforce any particular term or terms of any of such agreements would not meet the circumstances. That being so and the parties not having consented to the Court amending the agreements, the question for determination is solely whether the Court ought or ought not to annul the whole of the agreements. Having come to the conclusion that the enforcement of the agreements according to their terms would inflict a serious hardship on the company owing to the alteration of trade conditions occasioned by the war, I conceive it to be in accordance with the spirit of the section that the Court should annul the agreements unless the circumstances of the case or the position of the parties should

afford some good reason to the contrary, or unless the company are proved to have been unreasonable in not accepting any offer which the council may have made for a variation of the agreements. Before arriving at any decision therefore I must consider all the circumstances of the case, the position of the parties to the agreements, and any offer for a variation of the contracts which may have been made by any party. Both parties to the contracts are public bodies having important public duties to perform. The supply of electrical energy has in modern times become almost as important to the community as the supply of water. The council are under a statutory obligation to furnish a sufficient supply of electrical energy to owners and occupiers within their area of supply, and the maximum prices which they are authorized to charge are fixed. The charge which the council made to consumers for the supply of electrical energy has generally speaking remained unaltered during the war, although in all other metropolitan boroughs there has been a large increase. In October, 1919, the council made an increase of 25 per cent. upon their then charges to consumers. This increase was made in view of the increased cost of labour and materials in dealing with the electrical energy after it had been supplied by the company. I am informed that even with this increase the present charges are substantially below the maximum which the council are authorized to make and are substantially lower than the charges made in most of the metropolitan boroughs. The council are authorized to obtain their supply of electrical energy from other sources than from the company, and on the annulment of the agreements will be entitled to demand from the company and the company will in that case be bound to furnish to the council a sufficient supply of electrical energy for all their requirements at fair prices either fixed by, or to be ascertained in accordance with, the company's Acts of Parliament. There is therefore no question of the council being left without a supply of electrical energy or being left at the mercy of the company as regards the price of any electrical energy they may desire to obtain from the company.

P. O.
LAWRENCE
J.

1920

NORTH
METRO-
POLITAN
ELECTRIC
COMPANY
v.

STOKE
NEWINGTON
CORPORATION.
—

P. O.
LAWRENCE
J.
1920
NORTH
METRO-
POLITAN
ELECTRIC
COMPANY
v.
STOKE
NEWINGTON
CORPORATION.
—

Turning now to the position of the company: they were formed in 1900 for the establishment of central stations for generating electrical power and the supply therefrom of electrical energy in bulk to lighting authorities and to companies, bodies and persons authorized to supply such energy over a large area in the counties of Middlesex, Herts and Essex. The Legislature has recognized that the undertaking of the company is one of public and local advantage and has conferred large powers upon the company. On the other hand, it has imposed certain obligations on the company, including the obligation already referred to of supplying electrical energy, whenever demanded, to authorized distributors within their area of supply. The company have a total paid-up share capital of 950,000*l.* In addition to this, the company have issued 5 per cent. mortgage debentures for securing sums amounting in the aggregate to 284,800*l.* In the years 1916 and 1917 the company, besides placing substantial sums to general reserve account, paid a dividend of 10 per cent. on the ordinary shares amounting in each year to 35,000*l.* In 1918 the company placed 15,000*l.* to the general reserve account but paid no dividend on the ordinary shares. In 1919 the company paid 4½ per cent. on the ordinary shares amounting to 15,750*l.*, but placed nothing to the general reserve account.

The council contend that the company are a wealthy trading concern earning large profits and that the Court ought to take this circumstance into consideration as one of the circumstances of the case and ought on this ground to decline to annul the agreements, the loss on which would be amply compensated for by the profit they are making on the rest of their undertaking. I doubt very much whether, in considering either the hardship inflicted on the company if the agreements were to remain in force or the circumstances of the case generally, I ought to take into consideration any profits derived by the company from sources other than the agreements. I have however thought it best not to exclude the consideration of this circumstance. I think that the contention of the council on this point is sufficiently answered

by the fact that the supply by the company of electrical energy in bulk is a matter of public and local importance, and that it is essential that the company, if they are to continue such supply, should be able to earn sufficient profits to induce investors to take up capital in the concern as and when required for maintaining, improving and extending their undertaking, otherwise the company would soon find themselves in difficulties and might have to cease their operations. Judged from this standpoint it appears to me that during the last two years the profits of the company on the whole of their undertaking have reached a dangerously low level. Any contract therefore which tends to diminish these profits must necessarily jeopardize the future prospects of the company. In my opinion the meagre dividend paid for the year 1919 upon the ordinary share capital and the fact that nothing was set aside in that year for general reserve afford a sufficient answer to the suggestion that the company can well put up with the permanent loss which in my opinion would result if the Court were to refuse relief. I am of opinion therefore that the council's contention on this head fails.

There remains to be considered the offer for a variation which the company have made to the council. On February 19, 1919, just six months before the Courts (Emergency Powers) Act, 1919, received the Royal assent, the company made an offer to the council to vary the agreements by inserting a clause—called “the coal clause”—which provided for the rate of charge per unit being varied on the basis of the cost of coal at the rate of 6*d.* per thousand units increase or decrease per 3*d.* per ton increase or decrease above or below 15*s.* in the cost of coal as delivered into the bunkers of the company's power stations. This offer was accompanied by an explanatory memorandum in which the company stated the reasons for adopting the figures specified in the coal clause and how the clause would work. No reply having been received to this offer the company, after the passing of the Act of 1919 (namely, towards the end of September, 1919, and again in

P. O.
LAWRENCE
J.

1920

NORTH
METRO-
POLITAN
ELECTRIC
COMPANY

v.
STOKE
NEWINGTON
CORPORATION.
—

P. O.
LAWRENCE
J.

1920

NORTH
METRO-
POLITAN
ELECTRIC
COMPANY
v.
STOKE
NEWINGTON
CORPORATION.
—

October, 1919), reminded the council of the offer and invited a reply. The offer may therefore in my opinion be treated as an offer made after the passing of the Act of 1919, if that be material. It has never been withdrawn up to the present time, but the council have not accepted it nor have they commented upon it in any way, and at the hearing it was definitely declined by Mr. Jenkins. He stated that such offer amounted to no concession at all, as it merely contained the terms upon which the company were prepared to supply electrical energy to any customer at the present day. Mr. Tyldesley Jones on instructions denied this statement, and said that the company were only prepared to apply the coal clause to contracts with customers who stood in the same position as the council, and that a number of such customers had in fact consented to such clause being applied to their contracts. There is no evidence of either of these assertions by counsel, but I understood Mr. Jenkins not to dispute Mr. Tyldesley Jones' statement, although this may have been on account of lack of instructions upon the point. The principle of the coal clause appears to me to be fair, and no evidence has been adduced on the part of the council that the figures contained in the clause are otherwise than fair, nor has it been suggested that the reasons for adopting the figures set forth in the memorandum which I have referred to are ill-founded. I gather that the only ground for rejecting the offer was that the council thought that they were entitled to adhere to the terms of the agreements. During the discussion on this offer Mr. Jenkins said that he thought he might obtain instructions to make a counter-offer, which (as I understood him) was to the effect that the council would pay by way of additional price for the electrical energy supplied by the company under the agreements a sum of 372*l.* per annum, being one-half of the deficit of 744*l.*, the company's estimate of the works' cost of the current sold to the council after deducting the amount received from the council for the supply for the year 1919. When Mr. Tyldesley Jones stated that the company could not accept this offer Mr. Jenkins replied that he would then and there make a

definite counter-offer to that effect. It is open to doubt how far I am justified in treating an offer made under these circumstances seriously, or whether, even if I ought to do so, such an offer comes under the section at all, being really more in the nature of an offer made by counsel by way of compromise after the company's application for relief had been debated at considerable length before me. I incline to the view that *prima facie* the offer contemplated by the section is an offer which has been made before the application to the Court for relief under the section is launched or at all events before the case is opened, as the words are "any offer which may have been made." However that may be, I do not think that the refusal of this offer ought to induce me to decline to exercise the jurisdiction conferred on the Court by the section in the circumstances of this case. Upon the evidence before me I do not consider that the company were unreasonable in refusing the offer. In my judgment a payment of 372*l.* per annum would be inadequate and would not place the company in nearly as favourable a position as they would have occupied under the agreements if the trade conditions had not altered. In the result, after having considered the position of the parties, the offers which they have made, and generally all the circumstances of the case which have been brought to my attention, I have come to the conclusion that the company have made out a case for the annulment of the agreements. In conclusion I desire to state that I have not overlooked the argument which Mr. Tyldesley Jones has addressed to me on ss. 19 and 20 of the Electric Lighting Act, 1882. Having however arrived at the conclusion that the company are entitled to relief apart from the possible effect of those sections, I prefer not to express any opinion whether his argument is well or ill-founded. There will be an order to the effect that the four agreements be annulled as from the date of this order, but if the council so desire I will stay the operation of this order in order to give them an opportunity of taking the case to the Court of Appeal, or, if they decide not to appeal, then in order to give them an opportunity of obtaining their supply elsewhere or of making

P. O.
LAWRENCE
J.

1920
NORTH
METRO-
POLITAN
ELECTRIC
COMPANY
v.
STOKE
NEWINGTON
CORPORATION.
—

P. O.
LAWRENCE
J.

1920

NORTH
METRO-
POLITAN
ELECTRIC
COMPANY
v.
STOKE
NEWINGTON
CORPORATION.
—

arrangements with the company for the continuance of the supply.

Jenkins K.C. asked for costs.

Tyldesley Jones K.C. The Act no doubt gives the Court a discretionary jurisdiction, but the company from the beginning made a reasonable offer to do what was fair between the parties and no answer was made to the offer. The company do not under the circumstances ask for costs, but should not it is submitted be ordered to pay costs.

[P. O. LAWRENCE J. The application of the company is in the nature of an indulgence, because they seek to be relieved from their contractual obligations. The council are a public body having to protect the rights of their rate-payers and consumers, and it is very difficult to say that they have acted unreasonably in defending their agreements.]

It is submitted that it is not a question of indulgence at all, because the Act says that in a proper case relief may and ought to be given. I do not say that the conduct of the council has been unreasonable, but since the offer was first made the company have continued under the contract to supply the council at a very considerable loss. The Court is given a jurisdiction to do what is right and is not fettered by any equitable doctrine about relief against forfeiture or anything of that sort. Having regard to the position of the council, I do not under the circumstances ask for costs, but I do ask that the company should not be ordered to pay costs.

P. O. LAWRENCE J. I am not going to lay down any general rule, but in this case I am of opinion that the attitude taken up by the council was not unreasonable under the circumstances. They are a public body whose duty it is to look after and protect the interests both of their ratepayers and of their consumers; and as the company are really coming to the Court for relief from their contractual obligations with the council, I think the relief I have granted ought to be only on the condition of the company paying the costs of the application, and I so order.

[It was subsequently arranged that the operation of the

order should be stayed until the first Monday of next Easter Sittings and, in the event of notice of appeal being given, until the hearing of the appeal, and that in the meantime the company should continue to supply the council with power on the footing of the coal clause.]

Solicitors for the company : *Stanley & Co.*

Solicitor for the council : *Sidney White.*

H. L. F.

P. O.
LAWRENCE
J.
1920
NORTH
METRO-
POLITAN
ELECTRIC
COMPANY
v.
STOKE
NEWINGTON
CORPORA-
TION.

In re HINCKES.

DASHWOOD *v.* HINCKES.

C. A.
1921
Jan. 20.

[1920. H. 670.]

Will—Shifting Clause—Construction—“ Actually entitled to the possession or the receipt of the rents of ” the family Estate “ or the bulk of that estate ”—Event—Rentcharge exhausting Bulk of Rents—Lessee of Mansion House—Power to Jointure and Portion—Absolute Power of Appointment.

In 1900 G. was life tenant of a family estate. His son R. was second life tenant of the greater part, and remainderman in fee of the rest. G. and R. had a joint power of appointment over the whole estate.

R. was also life tenant of the H. estate, but under a shifting clause in the will devising it, he would lose it if he became actually entitled to the possession or the receipt of the rents of the family estate or the bulk of it.

In order to defeat this shifting clause and enable R. virtually to have the full benefit of both estates a conveyancing device was resorted to, whereby the family estate was appointed so that at G.'s death in 1919 the interests were as follows :—

1. R. was given a life rentcharge of 3700*l.* charged on the family estate but abateable in any year if it exceeded nine-tenths of the net rents now about 2000*l.*

2. Subject thereto the estate was limited to the trustees during R.'s life with possession and full powers of management.

3. The surplus income after paying the rentcharge and expenses was applicable for R.'s wife and children at the trustees' discretion.

4. The trustees were given the full powers of a life tenant under the Settled Land Acts.

5. R. was entitled to a lease of the mansion house, park and sporting rights at a nominal rent.

C. A.

1921

HINCKES,
*In re.*DASHWOOD
v.
HINCKES.

6. R. was given full powers of jointuring, portioning and appointing new trustees.

7. R. was given a power to revoke and appoint new uses :—

Held (affirming the decision of Astbury J. [1920] 2 Ch. 511), that the above device was effectual, and that R. though financially and otherwise in as good a position as if he were life tenant in possession of the family estate was not either at law or in equity entitled to the possession or the receipt of the rents of the bulk of that estate, and consequently the shifting clause did not operate.

APPEAL from the decision of Astbury J. (1)

By the Foxley Settlement of July 19, 1865, made in pursuance of directions in the will of John Davenport who died on April 18, 1862, the Foxley estate was settled to the use of the testator's eldest son George a bachelor for life, with remainder to the use of George's sons successively according to seniority in tail male with a like remainder to the use of his sons in tail general with remainder to the use of the testator's second son Harry a bachelor for life, with similar remainders to the use of Harry's sons in tail male and tail general as in the case of George with remainder to the use of George's daughters successively according to seniority in tail with a similar remainder to Harry's daughters with an ultimate remainder to the survivor of George and Harry and his heirs.

By her will dated October 23, 1872, Theodosia Hinckes devised the Hinckes estate to the use of Harry for life with remainder in the events that happened to the use of George's only son Ralph for life with remainder to the use of Ralph's sons successively according to seniority in tail male with remainder to the use of Ralph's sons in tail general with remainder in favour of the sons and grandsons of Harry (who died without issue) with numerous remainders over including (*inter alia*) limitations in favour of George's and Harry's female descendants with an ultimate remainder to George and his heirs.

The will contained a shifting clause which provided that if any child or remoter issue of George or Harry "within the scope of the limitations hereinbefore contained shall by any means whatsoever become actually entitled to the possession

or the receipt of the rents and profits of the Foxley estate " devised by the will of their father John Davenport and thereby directed to be settled " or the bulk of the same estate whether consisting of the same particulars as that estate now consists of or in manner altered in the way of addition substitution diminution or otherwise and so that this proviso shall not be rendered inoperative by reason of such estate or any part or parts thereof being subjected to any charges or incumbrances whatsoever then and so often as the same shall happen and thereupon every estate hereinbefore limited for life and in tail male and in tail to the child of ' George or Harry ' who or any of whose issue shall so become entitled and as to any child to whom an estate for life is hereinbefore limited to the first and other sons or daughters respectively of such child shall absolutely determine and the said premises hereinbefore devised shall go and remain discharged from all charges created by any such person as tenant of such estate for life under any of the powers of charging herein contained to the uses to which the same premises would have stood limited by my will if such child had died and there had been a general failure of his or her issue and if a male without leaving a widow."

C. A.
1921
HINCKES,
In re.
DASHWOOD
v.
HINCKES.
—

The will contained a name and arms clause requiring life tenants and tenants in tail male or in tail on becoming entitled to the actual possession or the receipt of the rents and profits of the Hinckes estate, to take the name and arms of Hinckes. This had hitherto been complied with.

The testatrix died on May 4, 1874, at which time George, who was married on February 6, 1866, was life tenant of the Foxley estate, and Ralph, born on January 28, 1873, was tenant in tail male subject to a jointure of 600*l.* to George's wife Sophia who in fact predeceased him. On the other hand Harry and Ralph became the first and second life tenants of the Hinckes estate.

By the Foxley disentailing deed of December 13, 1894, George and Ralph disentailed the Foxley estate and limited it subject to Sophia's 600*l.* jointure to such uses as they should jointly appoint and in default of appointment to the use of

C. A.
1921
HINCKES,
In re.
DASHWOOD
v.
HINCKES.
—

George for life with remainder (subject to a further 300*l.* jointure to Sophia) to Ralph and his heirs.

On March 19, 1895, Harry, then a widower, died without issue, and Ralph, still a bachelor, became the tenant in possession of the Hinckes estate.

By the Foxley resettlement of April 4, 1896, George and Ralph appointed the greater part of the Foxley estate (hereinafter called the settled portion) subject to Sophia's 900*l.* jointure to such uses as they should appoint and in default of appointment to the use of George for life in restoration of his former life estate with remainder to the use of Ralph for life with remainder to the use of Ralph's children as he should appoint and in default of appointment to the use of his sons successively according to seniority in tail male with remainder over.

As there was a considerable risk that Ralph might succeed to the Foxley estate and forfeit the now far more valuable Hinckes estate under the shifting clause the following appointment was executed to avoid this risk.

By the Foxley appointment of May 3, 1900, George and Ralph appointed the settled and unsettled portions of the Foxley estate subject to Sophia's 900*l.* jointure and subject to and preserving the joint powers in the resettlement and disentailing deed as to the settled and unsettled portions respectively. To the use that if Ralph survived George he should receive the yearly rentcharge of 2800*l.* during the residue of his life and after his mother Sophia's death then the further yearly rentcharge of 900*l.* during the residue of his life the said rentcharges to be charged upon the whole Foxley estate, the 2800*l.* rentcharge to commence from George's death and the 900*l.* rentcharge from the death of the survivor of George and Sophia : provided always that the said rentcharges should not in any year exceed nine-tenth parts of the net rents and profits of the Foxley estate in that year after payment of all annual sums (other than those rentcharges) and the interest on all principal sums (if any) charged on the Foxley estate and all management expenses and all other outgoings, and those rentcharges should, if

necessary, from time to time abate so as to give effect to this provision. And subject to those rentcharges it was declared that after George's death and subject as aforesaid the whole Foxley estate should thenceforth go to the use of the trustees during the residue of Ralph's life upon trust that they should enter into and continue in the possession or receipt of the rents and profits of the whole Foxley estate during the remainder of Ralph's life and manage that estate with all the powers in that behalf conferred on trustees during a minority by s. 42, sub-s. 2, of the Conveyancing Act, 1881; and also with powers to insure buildings, subscribe to local charities connected with the estate, expend money in planting woods, and orchards, and making repairs, alterations and improvements to the mansion house, etc. And it was declared that the trustees should out of the income of the Foxley estate including the produce of the sale of timber and underwood pay the management expenses and all outgoings and keep down all annual sums including the said rentcharges and the interest on all principal sums (if any) charged on the same estate and subject thereto should pay or apply the surplus income for the maintenance and support or otherwise for the benefit of all or any one or more exclusively of the others of Ralph's wife and issue for the time being in existence as the trustees should in their absolute discretion think proper or if there should for the time being be no object or only one object of such discretionary trust in existence then should pay or apply the surplus income for the maintenance and support or otherwise for the benefit of all or any one or more exclusively of the others of such one object (if any) and the person or persons who would under the limitations thereafter contained be entitled to receive the said income if Ralph had died immediately after George and without ever having been married as the trustees should in their absolute discretion think proper and it was declared that during the continuance of the estate thereinbefore limited to the trustees during Ralph's life the trustees should have all the powers of selling, leasing and other powers conferred on a life tenant by the Settled Land Acts, 1882 to 1890, and might exercise all those powers without the consent of any

C. A.
1921
HINCKES,
In re.
DASHWOOD
v.
HINCKES.
—

C. A.
1921
HINCKES,
In re.
DASHWOOD
v.
HINCKES.
—

other person; and further that the trustees should if Ralph so required demise to him for a term of ninety-nine years if he should so long live the mansion house and the park and grounds occupied therewith at a yearly rent of 300*l.* to be set off against a corresponding amount of the rentcharges for the time being payable to him, the demise to include such sporting rights over the residue of the Foxley estate as Ralph might require and to contain such covenants for payment of rents rates taxes insurance and repair as the trustees might think necessary. And subject thereto it was declared that the settled portion of the Foxley estate should remain To the use that Ralph during his life should have the like powers of jointuring and charging portions as were given to him by the resettlement and were thereby annexed to his life estate therein limited in like manner as if that life estate had not been over-reached and extinguished by this appointment but so nevertheless that the said powers of jointuring and charging portions might be over-reached by the trustees' exercise of their Settled Land Act powers and subject as aforesaid to the uses of the resettlement limited and to take effect after Ralph's death; and the unsettled portion of the Foxley estate should remain to the use of Ralph's right heirs; and it was declared that Ralph should have power to appoint new trustees. Provided always that it should be lawful for Ralph at any time by deed to revoke the uses thereinbefore limited and declared but as regards the settled portion of the Foxley estate only so far as the same did not extend beyond his original life estate under the resettlement and to declare any new uses but as regards the settled portion of the Foxley estate not exceeding in extent his original life estate and that subject thereto the Foxley estate should go and devolve in like manner in all respects as if this appointment had never been executed.

On December 7, 1909, Ralph was married and subsequently had a son and daughter born in 1910 and 1912 respectively.

On October 16, 1919, George died, and as his wife Sophia had predeceased him Ralph became entitled to both the rentcharges of 2800*l.* and 900*l.* on the Foxley estate. He had

applied for a lease of the Foxley mansion house and the trustees were willing to grant it.

The question having arisen whether the shifting clause contained in the will of Theodosia Hinckes had taken effect, a summons was taken out by one of the trustees to have the point determined. The other trustee was one of the remaindermen, defendants to the summons.

The Hinckes estate now produced about 4000*l.* a year net, and the Foxley estate about 2000*l.* a year net.

The summons was heard by Astbury J. on July 21, 22, 1920, when he held that having regard to the provisions of the Foxley appointment of May 3, 1900, Ralph was not either at law or in equity entitled to the possession or the receipt of the rents of the Foxley estate or the bulk thereof, and that consequently the shifting clause did not take effect.

The remaindermen claiming under the shifting clause appealed.

Upjohn K.C. and *Ashworth James* for the appellants. The question is whether the Court can have regard to the real substance of the transaction or is bound by the mere form of the instruments which were executed to carry it out. Under the appointment of May 3, 1900, the trustees were mere agents and managers for Ralph, who had a power of revocation and could appoint new trustees and limit the estate to new uses. The appointment was an ingenious device by conveyancers to defeat the intention of the shifting clause. The Court will have regard to the substance, and not give effect to the mere phrasing of dexterous draftsmen: *Adam v. Newbigging*. (1) The rentcharge is created by Ralph and is exactly co-terminous with his own life estate. The deed is in truth nothing but a dealing by Ralph with his life estate in the property in such a way as not to deprive him of any pecuniary interest or power of jointuring, etc. He and his trustees is or are in actual possession or receipt of the rents and profits of the Foxley estate and the shifting clause takes effect: *Leslie v. Earl of Rothes*. (2)

C. A.

1921

HINCKES,
In re.DASHWOOD
v.
HINCKES.

(1) (1888) 13 App. Cas. 308, 315.

(2) [1894] 2 Ch. 499.

C. A.
1921
HINCKES,
In re.
DASHWOOD
v.
HINCKES.

The conversion of Ralph's interest into a so-called rent-charge makes no real difference.

[YOUNGER L.J. What would be his remedy if the trustees defaulted in payment of it?]

Apart from such a case the rentcharge gives Ralph no different rights than he would have had in the absence of the deed.

The trustees are not really trustees in the ordinary sense. They are merely removable estate agents. Looking at the intention of the testatrix she has provided that if any child or remoter issue of George or Harry shall become actually or substantially entitled to the receipt of the rents and profits of Foxley the shifting clause shall take effect. Wrapping up the life estate in a rentcharge can make no difference. Ralph is a person who is by "any means whatsoever" entitled to receive from his agents the bulk of the rents and profits of Foxley, and the shifting clause takes effect.

[They also referred to *Garrard v. Lord Lauderdale* (1) and *Taylor v. Earl of Harewood*. (2)]

Romer K.C. and *Daynes* for the respondents were not called upon.

P. M. Walters for the trustees.

LORD STERNDALÉ M.R. This case raises a question as to the effect of certain clauses in a will and in a deed of appointment. The provisions of the deed have excited the admiration of the learned counsel for the appellants. He has spoken of them with that enthusiasm with which a painter speaks of a masterpiece of art, or a musician of a masterpiece of music. I do not say that his admiration was misplaced, but we have only the prosaic task of seeing what the clauses mean. I do not see my way to differ from the conclusion at which Astbury J. has arrived.

The facts are clearly stated in the report of the case in the Court below. It is sufficient to say that there are two estates which are dealt with, the Foxley estate and the Hinckes

(1) (1830) 3 Sim. 1, 12; (1831) (2) (1844) 3 Hare, 372.
2 Russ. & My. 451, 455.

estate. The Foxley estate was dealt with by a settlement of 1865 made in pursuance of the will dated in 1862, of Mr. John Davenport, and that settlement limited the Foxley estate to the use of the testator's eldest son George, who was then a bachelor, for life with remainder to his sons in tail male, with remainder to the use of his second son, Harry, also a bachelor; with remainder to his sons in tail male, with remainder to the use of George's daughters, and Harry's daughters, and an ultimate remainder to the survivor of George and Harry and his heirs. The Hinckes estate was devised by the will of Theodosia Hinckes, the testatrix in this case, to the use of Harry for life with remainder, in the events which happened, to the use of George's son—George had then married and had a son Ralph—for life, with remainder to the use of Ralph's sons in tail male and other remainders. That will contained a shifting clause which, so far as it is necessary to state it, was in these terms: "Provided always and I hereby declare that if any child or remoter issue of the said George Horatio Davenport or of the said Harry Tichborne Davenport within the scope of the limitations hereinbefore contained shall by any means whatsoever become actually entitled to the possession or the receipt of the rents and profits of the Foxley estate in the county of Hereford devised by the will of John Davenport deceased and thereby directed to be settled or the bulk of the same estate whether consisting of the same particulars" or not—then omitting words that I do not think are material—"every estate hereinbefore limited for life and in tail male and in tail to the child of" George or Harry "shall absolutely determine and the said premises hereinbefore devised shall go and remain discharged from all charges created by any such person" to certain uses that are mentioned.

The question here is whether in the events that have happened Mr. Ralph Tichborne Hinckes has become actually entitled to the possession or the receipt of the rents and profits of the Foxley estate or the bulk of the same estate. The testatrix died in May, 1874. Then George, as I have already pointed out, was from that time life tenant of the Foxley

C. A.
1921
HINCKES,
In re.
DASHWOOD
v.
HINCKES.
Lord Sterndale
M.R.

C. A.
1921
HINCKES,
In re.
DASHWOOD
v.
HINCKES.
Lord Sterndale
M.R.

estate, and Ralph, born in January, 1873, was tenant in tail male subject to certain jointures. There was a disentailing deed by which George and Ralph disentailed the Foxley estate and limited it, subject to certain jointures, to Ralph and his heir. Harry, the other son who was mentioned, died in 1895, without issue, and Ralph, still a bachelor, became life tenant at that time entitled to the possession of the Hinckes estate. Then there was a resettlement of the Foxley estate in 1896 by George and Ralph, by which they appointed it, subject to the jointures, to such uses as they should appoint and in default of appointment to the use of George for life in restoration of his former life estate, with remainder to the use of Ralph for life, with remainder to the use of Ralph's children if he should so appoint, and in default of appointment, to the use of his sons successively in tail male. On those facts it is obvious that there was at any rate a strong possibility, if not a strong probability, that Ralph might succeed to the Foxley estate, and might become actually entitled to the possession or the receipt of the rents and profits of that estate, or the bulk of it, and, as the Hinckes estate was the more valuable estate, he was anxious to avoid losing it by becoming entitled to the rents and profits of the Foxley estate, and in order to guard against that event, a settlement was executed on May 3, 1900, whereby George and Ralph, in pursuance of the powers of the resettlement of 1896 appointed the Foxley estate to the following uses. [The Master of the Rolls stated the provisions of the deed and continued:] It is clear, I think, that Astbury J. was quite right in saying that the substantial pecuniary and beneficial effect of the present arrangement so far as Ralph was concerned was the same as if he had retained his original life interest so far as the Foxley estate was concerned. As the learned judge says, it was not denied that under this document Ralph was at George's death placed in as good a financial position with regard to Foxley as if he had come into possession as life tenant under the previous limitations. That, I think, is right. But then it is argued that, that being so, he must be considered as having become actually entitled to the

possession or receipt of the rents and profits of the Foxley estate or the bulk of the same estate. I do not think so. In the first place these trustees are said to be trustees for Ralph of the rents and profits. I do not think they are. They are trustees for his wife and children, subject to the rentcharge, which is in his favour, if that can be considered as a rentcharge and not as a sham. They have not to hand to him the actual rents, and he, if that be a rentcharge, and so long as this deed of appointment stands, is not entitled to recover from the tenants any portion of the rent. What he is entitled to is to receive from the trustees a sum of 3700*l.* so long as nine-tenths of the rents are equal to that amount; when nine-tenths of the rents do not amount to 3700*l.* then he is only entitled to have the nine-tenths of the rents or an amount equal to nine-tenths of the rents, for he was never to have nine-tenths of the rents themselves. It is said we must regard this deed entirely as a sham, in this sense, that the trustees are not trustees at all. Their powers can be revoked at any moment, that is quite true, but I do not know of any authority for saying that a trust is not a trust although it is subject to a power of revocation, and I see no reason for saying, so long as these trusts are not revoked, that these trustees, who have certain duties to perform towards Ralph's wife and children, as well as towards himself, are not trustees, but, as it is said, are mere land agents managing the property for the purpose of handing over to Ralph the net rents and profits. So long as this deed stands, it seems to me impossible to say that. They are the constituted trustees, and until their power is revoked, they remain trustees. In the same way so long as this remains a rentcharge, and I see no reason for saying that a rentcharge is not created, Ralph is not entitled to the actual possession and receipt of the rents. Again, if I may take the learned judge's language, he expresses what I think is the right conclusion at which we ought to arrive: "The true meaning of the clause is that the shifting is to take place if the person in question becomes entitled to the possession or receipt of the rents and profits of the Foxley estate or the bulk of that estate as an estate."

C. A.

1921

HINCKES,
*In re.*DASHWOOD
v.

HINCKES.

Lord Sterndale
M.R.

C. A.
 1921
 HINCKES,
In re.
 DASHWOOD
v.
 HINCKES.
 Lord Sterndale
 M.R.

I have not said anything about the question of whether "the bulk" refers to the bulk of the rents or the bulk of the estate. I have rather taken the word "bulk" as being applicable to the bulk of the rents and profits, because that was the argument of the appellant, but I merely assume that. I do not decide it. Then the learned judge goes on: "Although Ralph has become entitled to the possession and receipt of something of equivalent or substantially equivalent value, he has by the conveyancing device to which he was entitled to resort, prevented himself from becoming entitled in fact to the possession or receipt of the rents and profits of the Foxley estate or any part thereof. He has only become entitled to a 3700*l.* rentcharge limited to nine-tenths of their amount. The entire possession of the rents and profits is in the trustees. Those trustees are not trustees of the estate or rents for Ralph. He has no doubt a power to alter the uses, but the difference between a power and property is plain."

I think that is the right conclusion. I do not wish to express it in any other words. I think, therefore, the appeal should be dismissed.

WARRINGTON L.J. I am of the same opinion. The question is whether the estate of one Ralph Tichborne Hinckes in certain lands conveniently referred to as the Hinckes estate determined by the operation of a shifting clause contained in the will under which he became entitled to that estate. Upon the death of Harry, on March 19, 1895, Ralph Tichborne Hinckes succeeded to the Hinckes estate as tenant for life, but the will under which he so succeeded contained a provision that if he, amongst other persons, should by any means whatsoever become actually entitled to the possession or receipt of the rents and profits of the Foxley estate devised by one John Davenport, and settled pursuant to his will, then, his estate under the testatrix' will should absolutely determine and the premises should go over as thereby directed. The question is whether, upon the true construction of the will of Theodosia Hinckes in the

events which have happened, the estate for life of Ralph Tichborne Hinckes has so determined.

So far as the construction of the will of Theodosia Hinckes is concerned, there seems to me to be no question about it. The will is skilfully drawn and I do not think there is any single part of it which gives rise to any difficulty of construction, certainly not the shifting clause. The words of the shifting clause describing the events on which the estate is to shift are "if by any means whatsoever" the person in question shall "become actually entitled to the possession or the receipt of the rents and profits of the Foxley Estate." Now, "the possession or receipt of the rents and profits" of an estate is a perfectly well-known technical term. It means possession of so much of the estate as is in hand, not let to tenants, and the legal right to receive and give discharges for, and to sue for, the rents of those parts of the premises which are let to tenants. That is the unquestioned legal meaning of those words. The only difficulty, if there be one, is caused, not by any construction of the will of Theodosia Hinckes, but by the events which have brought about the forfeiture for which she has provided. I will state the events that have happened. On and before May 3, 1900, the Foxley estate stood limited, speaking generally, subject to certain jointure rentcharges, to such uses as George Davenport, the father of Ralph, and Ralph should by deed jointly appoint, and in default of appointment, as to the greater portion of the estates, to the use of George for life, in restoration of his former life estate, with remainder to Ralph, and, as to a small residue of the estate, to George for life, with remainder to Ralph in fee. It is obvious that, under those limitations if not altered, upon the death of George, Ralph, surviving him, would have become entitled to the possession or receipt of the rents and profits of the Foxley estate, and would have lost the Hinckes estate. He and his father desired, if possible, to avoid that result and they accordingly executed a deed of May 3, 1900, which gives rise to the question. It was no doubt prepared and executed deliberately with a view of getting out of the shifting clause. I do not propose to

C. A.
1921
HINCKES,
In re.
DASHWOOD
v.
HINCKES.
Warrington L.J.

C. A.
1921
HINCKES,
In re.
DASHWOOD
v.
HINCKES.
Warrington L.J.

read it, it is enough to state the effect of it. By that deed, in exercise of the joint power, the father and the son limited the estate, after the death of the father, to the use that the son should receive a rentcharge, which, in the event that has happened, amounted to 3700*l.* per annum, but subject to a proviso that if the net rents and profits of the estate did not amount to 3700*l.* per annum, then the amount of the rentcharge should be reduced to a sum equal to nine-tenths of the net rents and profits. Subject to that rentcharge the estate was limited to the use of two trustees and their executors and administrators for the life of Ralph, that is to say, they took an estate pur autre vie with the nomination of a special occupant—namely, the executor of the surviving trustee, and the trusts on which this estate was thus limited to them were trusts to manage, to receive the rents, to discharge the outgoing, including the jointure rentcharges and the rentcharges created by this deed, and to stand possessed of the ultimate surplus rents upon discretionary trusts for the benefit of the wife and issue of Ralph, or some one or more of them; and the deed provided that at the request of Ralph the trustees should grant him a lease of the mansion house, park and grounds, together with the sporting rights over the estate, at a rent of 300*l.* a year, with a provision that that rent should be set against so much of the rentcharge; and it contained also a provision that Ralph should be at liberty to revoke the uses or trusts of the deed and declare any other uses and trusts.

Now generally speaking, speaking popularly and not as a lawyer, that deed obviously put Ralph for all practical purposes, pecuniary or otherwise, in the same position as if he had been owner for life of the Foxley estate. I do not think there is any doubt about it, and I will assume that it is so. But that is not the question. The question is, was he, under the provisions of that deed, actually entitled to the possession or the receipt of the rents and profits of the estate? That depends upon the legal position of the owner of a rentcharge. He is not entitled to the possession of the estate, he is not entitled to the receipt of the rents and profits; if his

rentcharge is unpaid he can take steps by which, either he or somebody else on his behalf, may get hold of the rents and profits and pay him, but he is not entitled to the possession or the receipt of the rents and profits. If anybody is beneficially entitled to the rents under the provisions of that deed of 1900, it is the wife and issue for the time being in existence collectively of Ralph, because the trustees are to apply the surplus of the net rents for the benefit of those persons or some or one of them. They cannot apply it outside, but they must apply it to the benefit of some one or more of them. That is why I say they collectively, if anybody, are beneficially entitled to the receipt of the rents and profits, subject of course to the rentcharge. The owner of a rentcharge has certain remedies of recovery, but he could not sue a single tenant for payment of his rent. It is said we must go behind the form and look at the substance. I do look at the substance, but, in order to ascertain the substance, I must look at the legal effect of the bargain which the parties have entered into and the legal effect is what I have stated. In my opinion, Ralph has not become entitled to the possession or to the receipt of the rents and profits of the estate or any part of them, and, that being so, the shifting clause contained in the will of Theodosia Hinckes has never taken effect. I entirely agree with the judgment of the learned judge, and think that this appeal must be dismissed.

C. A.
1921
HINCKES,
In re:
DASHWOOD
v.
HINCKES.
Warrington L.J..

YOUNGER L.J. I am of the same opinion. If, as a result of the Foxley estate reappointment of 1900, Ralph Tichborne Hinckes did become, in October, 1919, on the death of his father, and while that reappointment remained unrevoked by him, a cestui que trust and not an encumbrancer in respect of a rentcharge, then subject to the effect of the shifting clause in Miss Hinckes' will here in question, and the word "bulk," as to which I express no opinion, because we have not heard Mr. Romer, I should, I think (again for the same reason I express the opinion provisionally), be of opinion that Ralph would, within the meaning of the shifting clause,

C. A.
1921
HINCKES,
In re.
DASHWOOD
v.
HINCKES.
—
Younger L.J.

be actually entitled to the possession or the receipt of the rents and profits of the Foxley estate or the bulk thereof. I am guided to that conclusion by what I conceive to be the true effect of the judgment of Lindley L.J. in *Leslie v. Earl of Rothes*. (1) But I cannot myself escape from the conclusion that while that reappointment remains unrevoked, Ralph is not a cestui que trust of the rents and profits or any of them, but is an encumbrancer in respect of his rentcharge, and that it is in that latter character that his rights under that reappointment, if they were not recognized, would have to be enforced. On that footing, the result is, as I think, that while the reappointment of 1900 is admittedly in form successful for the purpose in view, it is also in the result effective to attain its purpose, which was, while it subsists, to make inoperative the shifting clause contained in the will of Miss Hinckes.

Accordingly it appears to me on those short grounds that this appeal should be dismissed.

Appeal dismissed.

Solicitors : *Johnson, Raymond-Barker & Co. ; Peake, Bird, Collins & Co. ; Bird & Bird.*

(1) [1894] 2 Ch. 499.

G. A. S.

Distinguished. Re BLATHWAYT'S
WILL TRUSTS. [1950] 1 All E.R. 582.

In re CONYNTHAM.

C. A.

1921

CONYNTHAM v. CONYNTHAM.

Jan. 12, 13;
Feb. 15.

[1920. C. 742.]

Will—Real Estate—Equitable Limitations—Strict Settlement—Revocation of First Life Estate—First Estate Tail not in esse—Interim Acceleration of Second Life Estate.

The testator by his will, dated in 1915, devised his Kent estates to the use of his trustees in fee simple, upon trust out of the income to pay certain life annuities, and, subject as aforesaid, the testator devised the said estates to the uses of his Irish estates—namely, to the use of his brother, the plaintiff, for life, with remainder to the use of the plaintiff's first and other sons successively, according to seniority in tail male, with remainder to the use of his nephew, the infant defendant, for life, with divers remainders over in strict settlement, and an ultimate remainder to the use of the testator's own right heirs. By a codicil dated in 1916 the testator revoked the plaintiff's life interest in the Irish estates "and all other benefits" given him by the will, and in lieu thereof he devised the Irish estates to the use of his trustees during the plaintiff's life upon trust to pay him a certain annuity out of income. In all other respects he confirmed his will. In 1918 the testator died a bachelor, leaving the plaintiff his heir-at-law. The plaintiff was married in 1914, but had no children:—

Held, that the testator had shown a clear intention to make the equitable limitations of the Kent estates completely exhaustive against his heir, and consequently until the plaintiff had a son the infant defendant's life interest in the surplus rents was accelerated.

Decision of Astbury J. [1920] 2 Ch. 495 affirmed.

D'Eyncourt v. Gregory (1864) 34 Beav. 36 and *In re Willis* [1917] 1 Ch. 365 followed.

Carrick v. Errington (1728) 2 P. Wms. 361; 5 Bro. P. C. 391; *Hopkins v. Hopkins* (1738) Cas. temp. Talb. 44; 1 Atk. 581; and *In re Scott* [1911] 2 Ch. 374 distinguished.

APPEAL from the decision of Astbury J. (1)

By his will dated April 11, 1915, the testator, the late Marquess Conyntham, after appointing his mother and another person executors and trustees, devised his Irish estates to his trustees upon trust to permit his mother to use, occupy and enjoy Slane Castle Meath and the furniture therein during her life and to receive a sum not exceeding 3500l. a year for the upkeep thereof. And subject thereto and to

(1) [1920] 2 Ch. 495.

C. A. certain life annuities thereby charged thereon To the use
 1921 of his brother the plaintiff (the present Marquess) for life
 CONYNHAM, without impeachment of waste With remainder to the use
In re. of the plaintiff's first and other sons successively according
 CONYNHAM to seniority in tail male With remainder to the use of his
 v. nephew, the infant defendant (John Francis Ainsworth) for
 CONYNHAM. life without impeachment of waste With remainder to the use
 — of that nephew's first and other sons successively according to
 seniority in tail male With divers remainders over in strict
 settlement and an ultimate remainder to the use of the
 testator's own right heirs.

The estates of tenants in tail male by purchase born in the testator's lifetime were, as usual, reduced to life estates with remainder to their sons in tail male.

The usual name and arms clause applicable to life tenants or tenants in tail male by purchase becoming entitled to possession or receipt of the rents provided that a life tenant refusing to take the name and arms should hold the rents and profits in trust for the persons who would be entitled if he were dead, and if the person so refusing were a tenant in tail male by purchase his estate should absolutely determine and the estates should devolve on the persons next in remainder as if he were dead without inheritable issue.

The testator devised his Kent estates including the furniture and fixtures at Bifrons to the use of his trustees upon trust to manage and cultivate the same with all the powers of absolute owners including powers to cut timber, make leases, accept surrenders, raise money by mortgage for the payment of mortgage debts, incumbrances, costs and expenses. And subject thereto upon trust out of the rents and income to pay certain life annuities to the testator's five sisters (some of whom were still living), any deficiency to be paid out of the Irish estates. And subject as aforesaid the testator devised the Kent estates to the uses of the Irish estates but not so as to increase or multiply charges or powers of charging.

By a codicil dated November 18, 1916, the testator, after reciting that by his will he had devised his Irish estates to the use of the plaintiff for life without impeachment of waste,

revoked the said devise "and all other benefits (if any) given
 to my said brother by my said will." And in lieu thereof
 the testator devised the said estates to the use of the trustees
 during the plaintiff's life upon trust out of the net rents and
 income to pay him a certain annuity. And in all other
 respects the testator confirmed his said will.

C. A.
 1921
 CONYNNGHAM,
In re.
 CONYNNGHAM
v.
 CONYNNGHAM.

The testator died a bachelor on November 8, 1918. The plaintiff was his heir-at-law. The plaintiff was married on November 28, 1914, but had no children. The infant defendant, the life tenant in remainder, was eight years old.

The question arose whether on the true construction of the will and codicil and in the events that had happened the surplus rents and profits of the Kent estates pending the birth of a son to the plaintiff went to the plaintiff as heir-at-law or whether pending that event the infant's life estate in remainder was accelerated.

On March 10, 1920, the plaintiff took out a summons to determine the point, all questions as to the Irish estates being left to the Irish Courts.

Astbury J. held that the testator had shown a clear intention to make the equitable limitations of the Kent estates completely exhaustive against his heir, and consequently, until the plaintiff had a son, the infant defendant's life interest in the surplus rents was accelerated.

The plaintiff appealed.

Maugham K.C. and *McMullan* for the appellant. Under the will the appellant took an equitable life interest with remainders over and a remainder to the infant respondent for life. The codicil revoked the appellant's life interest and turned the equitable interests in remainder into executory devises. The real question is whether the Court can imply a gift to the respondent during the life of the appellant until a son should be born to him, and, if such a son should be born and should die, then another gift to the respondent during the life of the appellant, and so on. There is no authority for implying such a gift in order to fill up a gap in the limitations, which was never contemplated nor

C. A. provided for by the testator. The appellant does not claim
 1921 under the will, but in spite of it. The surplus intermediate
 CONYNTHAM, rents are undisposed of and go to the appellant as heir-at-law.
In re. The next question is whether there is any ground for
 CONYNTHAM accelerating the life interest of the respondent. It is sub-
 v. mitted, on the authority of *Carrick v. Errington* (1) and
 CONYNTHAM. *Hopkins v. Hopkins* (2) that there is no such ground, and that
 — the surplus rents pending the birth of a son of the appellant
 go to the appellant as heir: see also 1 Jarman on Wills,
 6th ed., 718, 719. We rely also on *Gore v. Gore* (3) and *In re*
Scott. (4)

[WARRINGTON L.J. The statement in the last line of para. 3
 of the headnote in *In re Scott* (4) is incorrect. I did not
 decide that at all.]

In *In re Willis* (5), which is against the appellant's conten-
 tion, there was strong reason for the Court to struggle to hold
 as it did. *Hopkins v. Hopkins* (2), which really covers this case,
 was not there discussed.

Only by necessary implication of a gift to some one else
 can the heir be deprived of these intermediate rents: *Tre-
 gonwell v. Sydenham*. (6) The authorities do not justify any
 such implication in this case.

Micklem K.C., *Romer K.C.* and *L. W. Byrne* for the respond-
 ent. The testator has deliberately made an exhaustive
 disposition of his property away from his heir. The
 revocation applies to the ultimate trust. That he contem-
 plated a series of shifting uses is clear from the name and arms
 clause. An exhaustive series of executory limitations is
 created by the will and codicil, and the respondent takes an
 immediate vested estate in possession, subject to the valid
 executory devise or springing use in favour of possible sons
 of the appellant. It is not necessary for the Court to imply
 anything, as the limitations are all set out and cover every-
 thing. At the date of the will and codicil the testator must

(1) 2 P. Wms. 361; 5 Bro. P. C.
 391.

(2) 1 Atk. 581; Cas. temp. Talb.
 44.

(3) (1722) 2 P. Wms. 28.

(4) [1911] 2 Ch. 374.

(5) [1917] 1 Ch. 365.

(6) (1815) 3 Dow. 194.

be taken to have known the state of the family. On construction apart from the authorities, there would be no doubt in this case.

Carrick v. Errington (1) and *Hopkins v. Hopkins* (2) were relied upon by the appellant, but it is submitted that this case is on all fours with *D'Eyncourt v. Gregory* (3), where those cases were unsuccessfully relied upon for the heir-at-law. The intermediate rents go to the respondent subject to his interest being divested by the birth of sons of the appellant. It is said that the effect of the revocation of the appellant's life interest is to treat it as undisposed of; but see *Lainson v. Lainson* (4) which was discussed in *Jull v. Jacobs*. (5)

[SCRUTTON L.J. referred to *Turton v. Lambarde* (6) and *In re Townsend's Estate*. (7)]

[WARRINGTON L.J. *In re Townsend's Estate* (7) is explained in *Aplin v. Stone* (8), but the question there debated does not arise here.]

The authorities we have to meet are *Carrick v. Errington* (1) and *Hopkins v. Hopkins*. (9) The former is clearly distinguishable, as pointed out by Younger J. in *In re Willis* (10) and by Astbury J. in the present case.

Hopkins v. Hopkins (9) is more difficult to meet, but it is submitted that it is only an authority for this, that a contingent devise of real estate will not carry the rents in the interval until the contingency happens. Here the respondent's interest is not contingent.

The gift to the respondent is to him in remainder and carries everything that is undisposed of. It takes effect as an immediate gift of the freehold, subject only to the preceding estates. It is not a future but an immediate gift, and the Court is not asked to construe "after his death" or "in default of issue," or anything of that kind. The testator says "with remainder," which carries everything which is not exhausted

C. A.

1921

CONYNGHAM,
*In re.*CONYNGHAM
v.
CONYNGHAM.

(1) 2 P. Wms. 361; 5 Bro. P. C. 391.

(2) Cas. temp. Talb. 44; 1 Atk. 581.

(3) 34 Beav. 36.

(4) (1853) 18 Beav. 1; 5 D. M. & G. 754.

(5) (1876) 3 Ch. D. 703.

(6) (1860) 1 D. F. & J. 495, 516.

(7) (1886) 34 Ch. D. 357.

(8) [1904] 1 Ch. 543.

(9) 1 Atk. 581.

(10) [1917] 1 Ch. 365, 376.

C. A. by the preceding limitations. A remainder is what is left
 1921 over after the particular preceding estate has been carved
 CONYNHAM, out.

In re.

CONYNHAM

v.

CONYNHAM.

Luxmoore K.C. and *Dighton Pollock* for the trustees.

McMullan in reply. *D'Eyncourt v. Gregory* (1) is of no authority except in a case where the same words are used and under identical circumstances.

[LORD STERNDALE M.R. The same result was produced by the codicil here as by the shifting clause in that case.]

I rely chiefly upon *Hopkins v. Hopkins* (2) and *Carrick v. Errington* (3) which cannot properly be distinguished. There is no authority that "with remainder" carries everything not carried by the preceding limitations.

[He referred also to *Fearne on Contingent Remainders* (1844 ed.), p. 503, para. 5, and to Lord Coke's definition of a "remainder": see *Fearne*, p. 3.]

Cur. adv. vult.

Feb. 15. WARRINGTON L.J. read the judgment of the Court (Lord Sterndale M.R., Warrington L.J. and Scrutton L.J.). The question arises upon the effect in the events which have happened of the testamentary disposition of an estate in the county of Kent effected by the will and codicil of the late Marquess Conyngham. It is whether during the period which will elapse before a son is born to the present Marquess who has no children (which period may be of course the whole of his life) the rents and profits of the estate are undisposed of and should be paid to the Marquess as heir-at-law of the testator, or whether they are payable to the next tenant for life, who has a vested interest expectant on the failure of issue of the Marquess. The nature of the disposition of the Kent estate may be stated shortly, nothing turning in our opinion upon the precise words used. By the will which is dated April 11, 1915, the Kent estates were devised unto and to the use of trustees in fee simple upon trust for the present Marquess for life with remainder upon trust for

(1) 34 Beav. 36.

(2) Cas. temp. Talb. 44; 1 Atk. 581.

(3) 2 P. Wms. 361; 5 Bro. P. C. 391.

his first and other sons successively in tail male with remainder upon trust for the infant defendant, John Francis Ainsworth, for life with remainders over in strict settlement and an ultimate remainder upon trust for the testator's right heirs. The limitations are in fact by reference to the uses and upon the trusts declared of the Irish estates under which the estates were devised to "uses," and the successive takers were entitled to legal estates. In the case of the Kent estates the interests of the successive beneficiaries were clearly equitable and we have used the words "upon trust" in connection with the limitations as being the technically appropriate expression properly to describe equitable limitations.

C. A.

1921

CONYNGHAM,
In re.

CONYNGHAM

v.

CONYNGHAM.

By a codicil dated November 18, 1916, the testator revoked the life estate by his will given to the present Marquess "and all other benefits if any" given to him by the will, and in all other respects confirmed his said will. The testator died on November 8, 1918, a bachelor, leaving the present Marquess his heir-at-law. He is married but has no children. The equitable tenant for life in remainder expectant on the failure of male issue of the Marquess is living and an infant.

The testamentary disposition of the testator is contained in his will and codicil. In the present case no point of construction or otherwise arises from the fact that it is contained in two documents and we regard that fact as irrelevant. Under this disposition then, in the events which have happened, the Kent estates stand limited to the trustees for a legal estate in fee simple upon trust for the first and other sons of the present Marquess, should there be any, successively in tail male, with remainder to the infant defendant for life with remainders over, exhausting the entire fee simple, unless indeed the ultimate remainder to the testator's right heirs has been revoked (a question which need not be prejudged), in which case the ultimate remainder in fee would be undisposed of. But however this may be the fact remains that the testator has created a complete series of equitable limitations, each one of which is, or may be, capable of immediately taking effect subject to the interests of those

C. A. 1921
 CONYNGHAM,
In re.
 CONYNGHAM
 v.
 CONYNGHAM.

entitled under prior limitations. The particular limitation in question—namely, that to the infant tenant for life, is not contingent but vested. “Though the ulterior devise is in terms not to take effect in possession until the decease of the prior devisee, if tenant for life, or his decease without issue if tenant in tail, yet that, in point of fact, it is to be read as a limitation of a remainder, to take effect in every event which removes the prior estate out of the way”: per Jarman on Wills, 1st ed., 513. There is ample judicial authority for this view of successive limitations; it is enough to refer to *Lainson v. Lainson* (1), and particularly to the judgment of Turner L.J. The words introducing each successive limitation merely denote the order in which they are to take effect. If then the interest of the sons, if any, of the present Marquess fails, for whatever reason, the interests of those in remainder immediately take effect. But we have to consider what is the position while it is uncertain whether that interest will fail or not—namely, whether during the suspension of the prior interest, the next ulterior interest may take effect subject, of course, to letting in a son of the Marquess, if any son should hereafter come into existence. If the limitations were legal there would, we think, be a serious difficulty, because, if the legal seisin once passed under a subsequent limitation, there are no means by which it can be restored in favour of persons entitled under one prior thereto, except, perhaps, by some express shifting use which is not found here.

But we think such a technical objection has no application to a series of equitable limitations. The legal seisin is in the trustees throughout, and there is no technical difficulty, if the intention of the testator be such, in directing the trustees to pay the rents to a person entitled in remainder unless and until some person entitled under a previous trust shall come into existence: see per Lush L.J. in *Abbiss v. Burney*. (2) He says: “Where the legal fee was given to trustees by the same instrument, so that there were persons always at hand to fulfil the requirements of the feudal law, the Courts of

(1) 18 Beav. 1; 5 D. M. & G. 754, 756.

(2) (1881) 17 Ch. D. 211, 233.

Equity dealt with those equitable limitations according to their own principles, and, disregarding the feudal law to which there was no necessity to pay any attention as its requirements were already satisfied, they carried out the intention of the testator by giving effect to the equitable limitations according to the terms of his will." The same principle is enunciated by Sir George Jessel M.R. (1)

C. A.
1921
CONYNGHAM,
In re.
CONYNGHAM
v.
CONYNGHAM.

Looking at the matter then as a pure question of construction, the question is whether the testator has made a complete disposition of the rents of the estate during the period of suspension. As to this the circumstances under which the disposition was made are material and important. At the date of the codicil, by reason of which the testator's testamentary dispositions assumed their ultimate form, he knew that his brother had been married for upwards of a year and had no children; he therefore knew that it was possible that at his death there might be no son of his brother in existence capable of taking the estate, but that such a son might afterwards come into existence. Further he, of course, knew that the present Marquess as his eldest brother would be his heir-at-law if living at his death unless he, the testator, should leave a son. Under these circumstances he has declared trusts of his Kent estates, which, so far as is material to mention them, confer a vested life estate on the infant defendant subject to the trusts already declared in favour of possible sons of the Marquess. The terms in which the successive beneficial interests are conferred seem to us sufficient to include every element of the subject-matter not effectively given away to a previous taker, and if this is so then we think they ought to be so construed, and the effect would be that, during the life of the present Marquess, that is, so long as the possibility of a son being born to him continues, or until such a son is born, the rents should be paid to the infant defendant during his life. This is in effect the purport of the order appealed from.

We should be of this opinion independently of authority, but some authorities have been cited to which it is necessary

C. A. to refer. In *D'Eyncourt v. Gregory* (1) Sir John Romilly M.R.
 1921 arrived at the same construction under circumstances remark-
 CONYNNGHAM, ably like those of the present case. The testator there devised
In re. certain estates to trustees in fee upon trust to assure them
 CONYNNGHAM to the use of George Gregory for life with remainder to the
v. use of his sons and daughters successively in strict settlement
 CONYNNGHAM. in tail, with remainder to J. S. Gregory for life, with remainder
 to his sons and daughters in strict settlement in tail, with
 remainder to Sir Glynne Gregory for life, with remainders over.
 No settlement appears to have been actually made and the limitations were therefore equitable only. George Gregory was dead without issue. Under the provisions of the will and in the events which had happened the limitations had to take effect as if the life estate of J. S. Gregory had not been inserted. The subsisting limitations, therefore, were to the sons and daughters of J. S. Gregory successively in tail with remainder to Sir Glynne Gregory for life with remainders over. J. S. Gregory had no children. There, as here, the heir-at-law claimed the rents until the birth of a child, but the Master of the Rolls held that until the birth of a child to J. S. Gregory the rents ought to be paid to Sir Glynne Gregory as tenant for life. This case seems to us to be directly in point and supports the view we have expressed. *In re Willis* (2) is also in point and supports the same view. In fact the judgment of Astbury J. in the present case is founded upon the judgment of Younger J. in that case.

We now turn to some cases which are relied upon by the appellant. The case which on its facts is most like the present case is *In re Scott* (3), but the limitations in that case were legal, and, in our opinion, it is for that reason not in the same category as the present case and *In re Willis* (2), and we see no reason for discussing whether the decision was correct or not. There remain two old cases: *Carrick v. Errington* (4) and *Hopkins v. Hopkins*. (5) As to *Carrick v.*

(1) 34 Beav. 36.

(2) [1917] 1 Ch. 365.

(3) [1911] 2 Ch. 374.

(4) 2 P. Wms. 361; 5 Bro. P. C.

391.

(5) Cas. temp. Talb. 44; 1 Atk. 581.

Errington (1) estates were limited by deed in the events which happened to Thomas Errington, a papist, for life with remainder to trustees and their heirs during the life of Thomas Errington to preserve contingent remainders with remainder to his first and other sons in tail male successively with remainder to William Errington, a protestant, for life with remainders over. Thomas Errington was by statute (2) disqualified from taking the estate. He had no children. The rents were claimed by the heir and by the next tenant for life. The decision was in favour of the heir. In our opinion, however, this case has no application to the present; the point of the decision was that the estate of the trustees was a vested estate prior to that of William Errington, that it was still subsisting, Thomas being alive, and, as there were no presently effective trusts declared of the rents during its continuance, the heir-at-law was entitled to receive them from the trustees: see the statement of Lord Hardwicke as to the effect of Lord King's judgment. (3) It would appear from the statement of the case of *Carrick v. Errington* (1) in Brown's Parliamentary Cases that the legal estate was outstanding in a mortgagee, but in our opinion this fact makes no difference. In such a case, unlike that in which the legal estate is vested in trustees by the same instrument that declares the trusts thereof, equity strictly followed the law and dealt with the limitations as if they were legal. *Hopkins v. Hopkins* (4) came before the Court twice and under different circumstances. In the first case the point was this: By the will in question an estate was devised to the use of the trustees in fee in trust for Samuel Hopkins, the son of John Hopkins, for life with remainder to his first and other sons in tail male with remainder to the other sons, if any, of John Hopkins for their respective lives with certain remainders over, including a trust for the first and every other son of Anne Dare for life. Samuel Hopkins died in the

C. A.
1921
CONYNGHAM,
In re.
CONYNGHAM
v.
CONYNGHAM.
—

(1) 2 P. Wms. 361; 5 Bro. P. C. 391. growth of popery."

(3) 1 Atk. 597.

(2) 11 & 12 Will. 3, c. 4: "An Act for the further preventing the

(4) Cas. temp. Talb. 44; 1 Atk. 581.

C. A. lifetime of the testator, and, at the death of the latter, John
1921 Hopkins had no other son, nor was there any other remainder-
CONYNGHAM, man in existence except John, the son of Anne Dare. The
In re. plaintiff was the heir-at-law of the testator and claimed to
CONYNGHAM be entitled to the rents pending the birth of a possible son.
v. John Dare on the other hand asserted that under the
CONYNGHAM. circumstances all the limitations prior to his own had failed
for want of a particular estate to support them, and that his
own had taken effect. This point was decided against Dare's
contention on the ground that the trust for a future son,
if any, of John Hopkins should take effect as an executory
devise. The Lord Chancellor (Talbot) there held as a matter
of construction on the particular will that the rents in the
interval were undisposed of and passed to the plaintiff as
heir-at-law. In the view of the Lord Chancellor (1) this
point depended upon the wording of a particular proviso
in the will and that being so it is in our view distinguishable
from the present case, and ought not to influence our decision.
Hopkins v. Hopkins in its second form (2) raised a different
question altogether. After the decision of the previous case
a son had been born to John Hopkins and had died in his
father's lifetime. John Dare then insisted that the executory
devise in favour of the sons of John Hopkins having taken
effect all the limitations after it were contingent remainders,
and failed for want of a particular estate. He did not, and
I apprehend he could not, question the decree of 1734 as
to the destination of the rents. The judgment of Lord
Hardwicke established the well-known doctrine that in the
case of equitable limitations the estate of the trustees is
sufficient to support the contingent remainders, and on this
ground decided against the claim of John Dare. As regards
the intermediate rents he simply acted on the decree of 1734.
This case is, in our opinion, no authority with reference to the
question before us.

We need hardly say that it is of the essence of the view
we have expressed that the interest of the infant defendant

(1) *Cas. temp. Talb.* 51.

(2) 1 *Atk.* 581; *Cas. temp. Talb.* 52, note G.

is vested ; if it had been contingent, for example, on his being alive at the death of the Marquess, different considerations would have applied and such cases as *In re Townsend's Estate* (1) would have been in point. We are of opinion then that no technical objection stands in the way of giving effect to the intention of the testator as expressed in his will ; that the testator has sufficiently expressed his intention to dispose of the rents in the event which has happened, and that consequently the order of Astbury J. is right and should be affirmed.

C. A.
1921
CONYNGHAM,
In re.
CONYNGHAM
v.
CONYNGHAM.

Appeal dismissed.

Solicitors : *Gustavus Thompson & Sons ; Rawle, Johnstone & Co., for Finch, Johnson & Co., Preston ; Saltwell & Co.*

G. A. S.

TATE v. THOMAS.

EVE J.

[1920. T. 273.]

1921
Jan. 24, 25,
26, 27.

Copyright—Infringement—Musical Play—Authorship—Collective Work—Cinematograph Film Production—Licence—Copyright Act, 1911 (1 & 2 Geo. 5, c. 46), ss. 1, 5, 8, 16, sub-ss. 3, 35.

By an agreement dated April 17, 1917, between the plaintiff T. and P., it was agreed that P. should commission T. to write the music of a play called the "Lads of the Village," and that the other two plaintiffs, H. and V., should collaborate in the libretto and write the necessary lyrics. In consideration for this work P. agreed to make certain payments to T., to have the names of the authors and composers displayed on printed matter connected with the play, and also to pay a weekly royalty of 10*l.* whenever the production was played. P. was the originator of the name of the play and of the leading characters therein, and arranged the scenic effects and supplied certain catch lines in the dialogue. On the completion of the work by the three plaintiffs, P. claimed to be the author thereof and entitled to the ownership of the copyright. On February 20, 1918, P. assigned to the defendant company all his rights in the revue in consideration of 250*l.* and agreed to indemnify them in respect of any claims. On July 4, 1918, the defendant company gave a licence to the first defendant, Thomas, to produce

EVE J.
1921
TATE
v.
THOMAS.

a film of the play in consideration of a royalty. On the play bills, and in other agreements made by the defendant company, the plaintiffs' names appeared as the authors and composers of the play. In an action by the plaintiffs against the defendants for an injunction to restrain the infringement of the copyright:—

Held, that inasmuch as P.'s contribution to the production of the play was not the subject matter of copyright under the Copyright Act, 1911, he could neither be the sole author nor one of the joint authors of the play as a collective work within the meaning of that Act, and had no interest in the copyright of the play. *Tate v. Fullbrook* [1908] 1 K. B. 821 followed.

Held, further, that the agreement of April 17, 1917, did not amount to an equitable assignment of the copyright to P., who had only the qualified right to produce the play on the stage; and the plaintiffs were entitled to the injunction claimed and an inquiry as to damages.

ACTION WITH WITNESSES.

The plaintiff, James William Tate, was a musical composer, and the other two plaintiffs, Clifford Harris and Arthur Valentine, were dramatic authors who, for some time, had collaborated with J. W. Tate in the production of theatrical and musical plays. The defendant, Henry J. Thomas, was a stockbroker and a director of companies. The other defendants, the International Variety and Theatrical Agency, Ltd., were theatrical and variety agents and producers with their chief place of business in Johannesburg but with a registered office in London. The plaintiffs claimed to be the authors of a dramatic and musical production entitled "The Lads of the Village," and owners of the copyright therein. The originator of the name of this play was Joseph Bertram Peterman, who had produced many music-hall revues, including "The Belle of the Orient," "Hullo (any Town)," etc., and in 1915 conceived the idea of producing a war sketch in which the chief characters were Sir Carl Swinestein (the villain), a Red Cross Nurse (the heroine), Erb, V.C. (the hero), Bert (his pal), Capt. Williams, and Draack (a German spy).

In 1917 he met the plaintiffs and gave them a rough outline of the play to be called "The Lads of the Village," describing the scenes, characters and certain key lines in the dialogue. He had prepared a synopsis of the play which he read out to them. The early circumstances under which the play came to be produced sufficiently appear from the judgment.

By an agreement dated April 17, 1917, made between J. W. Tate and J. Peterman it was agreed that the latter should commission J. W. Tate to write the music of "The Lads of the Village," and that Clifford Harris and Arthur Valentine should collaborate in the libretto of the production and write all the necessary lyrics; the book, lyrics and music to be delivered on May 10, 1917. J. Peterman agreed, in consideration for this work, to pay J. W. Tate 40% on the signing of the agreement and the balance of 10% on May 1, and he thereby undertook and agreed that the names of the authors and composers should be displayed on all printed matter in connection with this production. J. Peterman further undertook to pay each week for every company and wherever played a weekly royalty of 10%. Should he fail to pay this royalty as and when due all stage performing rights were to revert back to the author and composer. On April 19, 1917, J. Peterman by agreement reciting that he was owner of the revue "The Lads of the Village" and entitled to the copyright of the same, assigned to the defendant company all his interest, title, and property in the said revue together with the copyright, in consideration for an advance of 275%, subject to a proviso for redemption. On May 14, 1917, the plaintiffs delivered the book, lyrics and pianoforte score to J. Peterman, for which he gave a receipt on the form submitted to him by the plaintiffs. The first performance of the play took place on June 4, 1917, at Southsea, and the play bill announced it as "arranged and originated by Joe Peterman" and the book and lyrics by Clifford Harris and A. Valentine, music by J. W. Tate. The play was performed at "The Oxford" on June 11, 1917, under a similar bill, but when the defendant company took over the play J. Peterman's name as the originator was omitted on the play bills. On February 20, 1918, J. Peterman assigned all his rights in the revue to the defendant company in consideration of 250% and agreed to indemnify the company against all claims in respect of the production. On July 4, 1918, the defendant company gave a licence to a representative of the defendant H. J. Thomas to produce a cinematograph film of the play in

EVE J.

1921

TATE

v.

THOMAS.

EVE J.
1921
TATE
v.
THOMAS.

consideration of a royalty, but it proved a failure as a film production. Other agreements were entered into by the defendant company for the production of the play, and in these the plaintiffs names appeared as the authors and composers, and when Colonial and American rights were dealt with declarations were made by the plaintiffs that they were the authors and composers. The plaintiffs now brought their action to restrain the defendants from infringing their copyright in the play by causing the cinematograph version thereof to be played, damages, and delivery up of all films.

The defendants did not admit the plaintiffs to be owners of the copyright, and denied infringement.

In the alternative the defendant company pleaded that if the plaintiffs were the owners of the copyright they were not aware of it and had no reasonable ground for suspecting the existence of such copyright.

The defendant H. J. Thomas also disputed the plaintiffs' copyright, but admitted the production of the film in October, 1919, under licence from the defendant company.

Evidence was given by the three plaintiffs, and by J. Peterman and C. Baldwin and V. Roberts for the defendants.

Albert Frederick Ross, a director of the International Variety and Theatrical Agency, Ltd., was also examined on commission in particular as to the dealings of the company with J. Peterman, and said that he knew him to be the author of the play, and dealt with him as the sole owner and producer of all the rights connected with it, and that the company had acquired from him all the rights, subject to the royalty to J. W. Tate.

Clayton K.C. and *W. A. Jowitt*, for the plaintiffs. Under the agreement of April 17, 1917, the three plaintiffs are the joint authors of this play and the owners of the copyright therein under the Copyright Act, 1911, s. 1. It is admitted that Peterman originated the idea of the play and suggested scenes, characters and catch lines, but the dialogue, lyrics, and music were the work of the plaintiffs. Peterman cannot

claim the authorship of anything which is entitled to protection under the Copyright Act, 1911: *University of London Press v. University Tutorial Press* (1); *Kenrick & Co. v. Lawrence & Co.* (2); *Nottage v. Jackson* (3); *Byrne v. Statist Co.* (4); *Tate v. Fullbrook.* (5) On the question of whether the infringement was innocent under s. 8 of the Copyright Act, 1911, *Byrne v. Statist Co.* (4) is conclusive against that contention pleaded in the defence. Nor is the defendant a joint author within s. 16, sub-s. 3, of the Copyright Act.

EVE J.

1921

TATE

v.

THOMAS.

Hawke K.C. and *S. P. Kerr* for the defendants. The defendants claim through Peterman and it is submitted that he is the sole creator of this play, having arranged the scenes, plot, and the whole of the important characters. As the infringement complained of is the reproduction on a cinematograph film where there is no dialogue or music, his work is the important part, and he has the copyright in the pictorial part at least. If not the sole author, he is thus a joint author of what is really a "collective work" within the Copyright Act, 1911, s. 35, sub-s. 1. The pictorial side is a distinct part of the play: Copinger's Law of Copyright, 5th ed., p. 84. Lastly, there has been an equitable assignment of the copyright to him by virtue of the agreement of April 17, 1917. When the agreement refers to the collaboration on the libretto of the production, the collaboration is with somebody else than the other two plaintiffs—namely, with Mr. Peterman. The result is that the whole of the copyright including the cinematograph rights passes to Peterman: *Ward, Lock & Co. v. Long.* (6) With regard to s. 8 of the Act, after the decision of Bailhache J. in *Byrne v. Statist Co.* (4) the present case cannot be distinguished from it: *Savory, Ltd. v. The World of Golf.* (7)

That there can be collective copyright seems to be established by the older cases of *Barfield v. Nicholson* (8);

(1) [1916] 2 Ch. 601.

(2) (1890) 25 Q. B. D. 99.

(3) (1883) 11 Q. B. D. 627.

(4) [1914] 1 K. B. 622.

(5) [1908] 1 K. B. 821.

(6) [1906] 2 Ch. 550.

(7) (1914) 83 L. J. (Ch.) 824.

(8) (1824) 2 L. J. (Ch.) O. S. 90.

EVE J. *Hildesheimer v. Dunn & Co.* (1); *Grace v. Newman.* (2) In
 1921 the present case one person has commissioned others to col-
 TATE laborate in a collective work, and it is open to the Court to
 v. infer from the circumstances of the case that the collective
 THOMAS. copyright is in the person commissioning the work.

Clayton K.C. in reply. Under s. 31 of the Copyright Act, 1911, there can be no copyright outside the Act. He also referred to *Baggs v. Miller.* (3)

EVE J. The plaintiffs in this action are three gentlemen accustomed to collaborate in the production of revues and dramatic pieces for stage purposes, one of them composing the music and the other two writing the words, and they claim damages from the defendants for an alleged infringement of their copyright in so far as it includes the right to produce a film version of a dramatic work called "The Lads of the Village." It is admitted that if the plaintiffs are the owners of the copyright that which the defendants have done constitutes an infringement of their rights, and further that the defendants are in no better position as regards their claim to copyright in the said work than Mr. Joseph Peterman through whom they claim would have been had he not parted with his interest. The real issue I have to determine is whether Mr. Peterman ever had any interest in the copyright either as the author or one of the joint authors of the work. There is this further suggestion, that if he is not either the sole or a joint author he may have acquired the copyright as assignee from the plaintiffs under an agreement to which I shall have to refer later on.

The evidence, which I do not propose to go through in detail, comes to this, that some few years ago in the early days of the war Mr. Peterman conceived the idea of a play embodying incidents appropriate to the warlike atmosphere then subsisting, to which he contemplated attaching a name suggested by a prominent advertisement not unconnected with the assassination of flies. It was to be called "Kill that Spy,"

(1) (1891) 64 L. T. 452.

(2) (1875) L. R. 19 Eq. 623.

(3) The Times, July 22, 1920.

the spy being a German and the characters including a hero and heroine, the latter of whom was to turn up in very unexpected places but at most opportune occasions.

The plot—if such it can be called—was outlined to Mr. Roberts, the stage manager at the Oxford, and with the assistance of Mr. Baldwin a rough sketch was later on reduced into writing.

Mr. Peterman acting on the advice of his friends decided to postpone the production of the play for a period, but early in 1917 finding there was a demand for plays dealing with incidents connected with the war he decided to put his idea into a more concrete form and with that view he opened up communications with the plaintiffs in Manchester in January, 1917. They were somewhat suspicious of Mr. Peterman's ability to pay for their services and the matter languished a little until April, when Mr. Peterman having obtained some financial assistance was in a position to enter into an agreement with the plaintiffs whereby they agreed to compose the music and write the lyrics and dialogue appropriate to the subject matter of the proposed work, and he agreed to make them certain payments for their services. The music was composed and the lyrics and dialogue duly written, (and prima facie the production was one of which the plaintiffs were the joint authors and as such owners of the copyright.

But Mr. Peterman contends that he was really the author or at least a joint author with the plaintiffs.)

It is not disputed that he suggested the name of the piece, and there is no doubt that in many parts of the work are introduced incidents suggested in his rough sketch or culled from works in which he has no copyright interest. One of the witnesses called for the defendants went so far as to say that the whole play was "pinched" from other people's productions. I had the opportunity of seeing Mr. Peterman in the witness box and I can well understand that he is speaking the truth when he states that he was frequently making suggestions to the authors and indicating to them how they were to do the work they had undertaken. He is a gentleman of a fertile imagination and possessed of a fluency

EVE J.

1921

TATE

v.

THOMAS.

EVE J.
1921
TATE
v.
THOMAS.

and powers well qualifying him for communicating his views to the authors.

The plaintiffs do not deny that their work embodies some ideas and a few catch lines or words for which Mr. Peterman may claim credit, but they dispute altogether his claim to a share in the authorship of the work and contend (and in my opinion rightly contend) that the sum total of his contribution does not amount to anything entitled to protection under the Act. His assistance, such as it was, was confined to accessorial matters such as scenic effects, or stage "business" not the subject matter of copyright.

When the work was completed the names of the plaintiffs were inscribed thereon as those of the authors. On all further copies of the work made for the use of the performers and actors the authorship was again attributed to these gentlemen, and in the poster and other literature issued in connection with the production a statement was made to the effect that the play had been composed and written by the plaintiffs. Finally, when it became necessary to deal with the Colonial and American rights and for that purpose to obtain declarations as to the authorship of the work, the plaintiffs, at the instigation and at the request of the company who claim through Peterman, made declarations that they were respectively the authors and composer.

By these circumstances a strong presumption is raised that the plaintiffs were the authors and sole authors of this work, and as such are entitled to the copyright. To rebut this presumption two arguments have been advanced, the one that in a work of this class when the dialogue is of an ephemeral character and of little or no account compared with the scenes and action depicted, the real author is the man who—so to speak—stages the piece, arranges the scenes, and determines the appropriate action—and the other that when the infringement complained of is the reproduction of the drama in the cinema, and therefore without the dialogue, the true owner of the copyright must be the individual responsible for the scenic effects, and not the musical composer, or the writers of the dialogue. I think the former of

these arguments is disposed of by the judgment of the Court of Appeal in *Tate v. Fullbrook* (1), and the latter by para. (d) of sub-s. 2 of s. 1 of the Copyright Act, 1911. In *Tate v. Fullbrook* (1) it was pointed out that the Act creates a statutory monopoly, and that there must be certainty in the monopoly so created in order that injustice may be avoided. To bring about this result there must be matter capable of being printed and published. Scenic effects may be protected as part and parcel of the drama, but they cannot in themselves be subject matter for the statutory protection. Even were I to give Mr. Peterman credit for a much larger share than I am prepared to attribute to him in settling the scenes and accessories of this play, I could not hold his claim to be considered the author of the piece paramount to that of the plaintiffs. I am quite satisfied that he cannot be regarded as the author. Then it is said that if he is not the sole author, he is at least a joint author. A suggestion has been made that the play is a collective work, but I am not prepared to treat it as a collective work within the meaning of the Act. It is, however, a work in the production of which there could be joint authorship. The question whether Mr. Peterman's claim to be a joint author of this work, so far as it is subject matter for protection under the Act, is one of fact; and having heard all the evidence I have come to the conclusion that his contributions to the matter capable of being printed and published were so insignificant and negligible as to make it quite impossible for me to hold him to have been in any sense a joint author within the Act. But then it is said that on the true construction of the agreement of April 17, 1917, he was to be treated from the beginning as a joint author, and that when Tate and Peterman agreed that Peterman should commission Tate to write the music and that Clifford Harris and Valentine should collaborate on the libretto of this production and write the lyrics, it was, in substance, an agreement by Tate on behalf of himself and his two co-plaintiffs that the latter would collaborate not inter se but with Peterman. I think that is an impossible construction

EVE J.
1921
TATE
v.
THOMAS.

(1) [1908] 1 K. B. 821.

EVE J. to impose on the agreement, and as Mr. Clayton pointed out
1921 it is one which, having regard to the later part of the agreement,
TATE would involve extraordinary results. On the agreement I
v. hold that Mr. Peterman has failed to establish any right
THOMAS. in the authorship of this play. This brings me to the last
defence raised in the action. It is of an alternative nature,
and rests on the contention that even if the plaintiffs
were the authors of the play the agreement of April 17
operated as an assignment in equity to Mr. Peterman of
the copyright.

I do not think this defence is open to the defendants on the pleadings ; if it had been intended to raise it the facts on which it is founded ought to have been pleaded, but the case has lasted so long that I should be loth to leave any matter undisposed of and I therefore propose to express my opinion upon it. I do not think there is any substance in it. Peterman undoubtedly was intended to acquire some rights under this agreement ; the question is what rights ?

Nothing; as I read the document, beyond the right of producing on the stage the music, the libretto, and the lyrics, a right qualified by the provision that he is to enjoy it only so long as he makes the payments stipulated for ; if he fails to make those payments his interest is to determine and the right reverts to the authors without any formal assignment. [His Lordship referred to this part of the agreement and continued :] I think the agreement is perfectly clear, it gives Mr. Peterman the right to produce as a stage performance the work of the three plaintiffs so long as he makes the payments of the royalties therein provided for ; if he fail to pay these royalties such interest as he takes comes to an end. In these circumstances it is quite impossible for me to hold that the agreement operated as an assignment of anything belonging to the authors except this qualified right to produce the play on the stage.

< The net result is that Peterman never had any interest in the copyright of this play and he had nothing to pass on or transfer to the defendants, and the plaintiffs are entitled to the injunction they claim.

I direct an inquiry as to the damages they have sustained, and order the defendants to pay the costs of the action down to and including this judgment; the subsequent costs are reserved.

EVE J.
1921
TATE
v.
THOMAS.
—

I have not dealt with the point taken under s. 8 of the Copyright Act, 1911, because that section has already been construed by Bailhache J. in *Byrne v. Statist Co.* (1) I have not been referred to any case in which his construction of the section has been dissented from and I agree with him. I do not think the section lends itself to any other construction than that which he put upon it.

Solicitors: *J. B. & G. S. Burton; Roberts, Seyd, Jackman & Falck.*

G. M.

In re RICHARDS.

EVE J.

JONES *v.* REBBECK.

1921
Jan. 11, 31;
Feb. 1, 4.
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[1920. R. 1155.]

Donatio mortis causa—Registered Victory Bonds—Subject Matter—Incomplete Gift—Validity—Executors—Registration of Donee as Owner.

On October 18, 1919, a testator, who was suffering from a combination of maladies and about to undergo a critical operation, gave ten 4 per cent. Registered Victory Bonds of 100*l.* each to a lady who had been his close friend for many years, saying to her, "Will you take them home and take charge of them till such time as I am able to go to London? But if anything happens to me you are to keep them for yourself." The testator was unable to undergo the contemplated operation and died on October 20, 1919.

The Victory Bonds were registered in the name of the testator, and each bond expressed all the terms on which the money was held, and showed the whole contract between the Government and the lender.

Held (1.), that there was a good *donatio mortis causa*, inasmuch as there was clear evidence that the testator intended that the lady should retain the bonds for herself in the event of his death, and further that the *donatio* was not conditional upon death from a particular cause.

EVE J.
1921
RICHARDS,
In re.
JONES
v.
REBBECK.

Held (2.), that the bonds were good subject matter of the donatio mortis causa, and it was the duty of the executors of the testator to give effect thereto by such transfer as would enable the donee to be registered as owner.

In re Dillon (1890) 44 Ch. D. 76 followed.

ADJOURNED SUMMONS

By his will dated June 15, 1901, the testator, David Richards, appointed the plaintiff, Thomas Jones, and his brother the defendant, John Thomas Richards, executors and trustees, and after giving certain specific and pecuniary legacies, including one to the first defendant, Rose Ella Rebbeck, of 200*l.* free of duty, and another of 1500*l.* (increased by a codicil to 4000*l.*) to the same defendant, he devised and bequeathed all his residuary real and personal estate to his executors and trustees upon trusts, as declared by a first codicil, for his mother, brothers and sisters as therein mentioned. By the same codicil the testator revoked the appointment of J. T. Richards as trustee and appointed another in his place. The testator died on October 20, 1919, and the gross value of the estate was sworn at 59,304*l.* 16*s.* 1*d.*, and the net value at 33,827*l.* 5*s.* 3*d.* The plaintiffs were the present trustees, and discovered that ten 4 per cent. Victory Bonds of the face value of 100*l.* each, which had been registered in the name of the testator in the books of the Bank of England, were in the possession of R. E. Rebbeck, who claimed to retain them. By her affidavit made on October 19, 1920, R. E. Rebbeck deposed that she had been on very friendly terms with the testator for twenty years, and that for two years before his death he had been suffering from neurasthenia, paralysis, and stone in the bladder, for which he had been advised by his doctor to undergo an operation, but he was reluctant to do so, and the operation was never in fact performed. About the end of August or beginning of September, 1919, the testator went to a nursing home at Newbury for treatment for neurasthenia, where the deponent visited him frequently. On July 30, 1919, the testator informed her that he had bought 1000*l.* worth of Victory Bonds. In September, 1919, he showed her a registered envelope containing the Victory Bonds, which

he placed in his dressing-case. She subsequently, in response to a letter from the testator, went to Bath where he was staying at an hotel. On the evening of October 17, 1919, he dislocated his knee on rising from the dinner-table, and was confined to his bed until his death. On October 18, 1919, the deponent called at the hotel, and the testator said: "I still have those Victory Bonds with me. I am lying here chained to the bed, with servants and strangers in and out of the room, and I do not feel quite easy about them. Will you take them home and take charge of them till such time as I am able to go to London? But if anything happens to me you are to keep them for yourself, as anything might happen these days." The testator then asked her to take the bonds out of his dressing-case, and she did so, showing him the registered envelope containing the bonds, and subsequently took the envelope and bonds with her when she left, and had retained them ever since. In the course of conversation on the same day the testator said: "You will never see me walk again. The internal trouble has got much worse since I have been here, and the operation must take place." He died two days after, and the doctor certified that death was due to a distended stomach.

By a letter dated October 29, 1919, written by Miss Rebbeck to Mr. Davies, one of the executors, she said: "I want to tell you that a few days before David died he gave me some Victory Bonds to take charge of, and he said if anything happened to him (I mean, of course, the operation) they were to be mine absolutely." And in reply to a letter of March 4, 1920, from the solicitors of the executors asking for information as to the scrip which she claimed to retain, she replied on March 5 saying: "The day after Mr. Richards met with the accident to his knee I called at the Spa Hotel to take tea with him as usual. He was rather depressed over his condition, as he had also been advised to undergo a very critical operation. He asked me to take charge of the bonds until he was well enough to go to London, and he said, 'Meantime if anything happens to me you must keep them, as anything might happen these days.' Three days later he died suddenly, and in

EVE J.

1921

RICHARDS,
*In re.*JONES
*v.*REBBECK.
—

EVE J.
1921
RICHARDS,
In re.
JONES
v.
REBBECK.

retaining the bonds I feel I am only carrying out his instructions and wishes in the matter." These 4 per cent. Victory Bonds were repayable out of a sinking fund by means of annual drawings commencing September 1, 1920, and entitled the bearer, or if registered the registered owner, to receive the sum of 100*l.* on the September 1 next following the day on which it was drawn for redemption, together with interest thereon at 4 per cent. payable half-yearly on presentation of the coupon attached. The terms and conditions of the bond were fully set out therein, and an indorsement stated that they could be registered free of charge in the books of the Bank of England and, if registered, must be presented at the Bank to be indorsed with the name of the registered holder. Registered bonds were to be transferable by transfer deed to be lodged at the Bank with the relative coupons. On July 12, 1919, the bonds were registered in the name of David Richards, the testator. It appeared from a docket or talon attached to the bond that when the coupons attached thereto were exhausted, a new coupon sheet would be issued free of charge on presentation of the talon at the Bank of England. The defendant had not cashed any of the coupons pending the hearing of the summons.

On July 7, 1920, the present executors and trustees of the will took out an originating summons asking five questions arising in connection with the testator's estate, the first of which alone calls for notice. It was whether the testator had made an effective gift or donatio mortis causa to the defendant, Rose Ella Rebbeck, of ten 4 per cent. Victory Bonds of 100*l.* each and/or of the interest coupons attached thereto, or whether such Victory Bonds and/or the said coupons formed part of the estate of the testator, and should be delivered up to the plaintiffs.

Colquhoun Dill for the executors and trustees.

J. F. Carr for Rose Ella Rebbeck. On the evidence of Miss Rebbeck, who was not cross-examined, there has been a good donatio mortis causa made in contemplation of death. It was a completed gift so far as the testator could make it.

The question of law is whether these registered Victory Bonds are good subject matter of a donatio. The leading case on this point is *Ward v. Turner* (1) in White & Tudor's Leading Cases in Equity, 8th ed., vol. i., pp. 413, 427. In *Duffield v. Elwes* (2) it was held that a delivery by a man in contemplation of death of deeds, including a conveyance of land and a bond and assignment of a mortgage debt, was a good donatio mortis causa. Other cases of gifts of bonds, receipts and deposit notes, where the validity of the gift as a donatio mortis causa was discussed, are *Gardner v. Parker* (3), *Moore v. Darton* (4), and *In re Taylor*. (5) The strongest case in my favour is *In re Dillon* (6), where Cotton and Lindley L.JJ. discussed *Duffield v. Elwes* (7) and held that a banker's deposit note was good subject matter, and laid down the tests required to satisfy a good donatio. The Victory Bonds in the present case satisfy all those tests. There may be a good donatio of an instrument not passing by delivery. In *In re Weston* (8) the certificates of shares in a building society were held to be not proper subject matter for a donatio mortis causa, while the gift of a deposit-book in a Post Office Savings Bank was held good. Byrne J. states the true test to be: "Has the donor done all in his power to transfer the property?" In the present case the bonds are transferable by deed, but the attached coupons are payable to bearer notwithstanding registration in the testator's name. In *In re Wasserberg* (9), a case where bonds to bearer were the subject of a donatio mortis causa, Sargant J. said: "When it is once admitted that any property is a possible subject matter for a donatio mortis causa—and in fact chattels of all kinds are much more obviously and readily within this category than choses in action—I can see no more reason for declining to give effect to an incomplete or inchoate gift in the case of the one class of property than in the case of the other." *In re Lee* (10) was the case of a gift of an Exchequer Bond Deposit Book two days

EVE J.
1921
RICHARDS,
In re.
JONES
v.
REBBECK.

(1) (1752) 2 Ves. Sen. 431.

(6) 44 Ch. D. 76.

(2) (1827) 1 Bli. (N. S.) 497, 533.

(7) 1 Bli. (N. S.) 497.

(3) (1818) 3 Madd. 184.

(8) [1902] 1 Ch. 680, 683.

(4) (1851) 4 De G. & Sm. 517.

(9) [1915] 1 Ch. 195, 203.

(5) (1887) 56 L. J. (Ch.) 597.

(10) [1918] 2 Ch. 320.

EVE J.
1921
RICHARDS,
In re.
JONES
v.
REBBECK.

before the death of the donor, and that was held sufficient to pass the right to registered Exchequer Bonds and was a valid *donatio mortis causa*. In the present case the contract set out in each Victory Bond contains the whole of the terms upon which the capital is repayable and the provisions for payment of interest by attached coupons. The executors of the testator should be directed to complete the title of the donee by transferring the bonds to her.

Gover K.C., *E. Bowen-Rowlands*, and *H. Walter Samuel* for some of the beneficiaries. We submit that the gift is not established, the burden of proof being on the donee. The bonds were given to the defendant for safe custody and for a limited time. The intention of the testator was that if he did not recover from the contemplated operation the donee was to have them; and the operation not having taken place, our submission is that the gift fails altogether. But assuming the gift to be good, these bonds are not good subject matter for a *donatio*. If the dictum of Sargant J. in *In re Wassenberg* (1) is sound, that decides the question against our contention. But we submit that it goes too far. Since these donations were adopted from the Civil Law, it has been established that nothing short of a proper transfer of the registered bond would be sufficient in a case of this kind. The dicta in *In re Dillon* (2) were based on *Duffield v. Elwes* (3), and *Ward v. Turner* (4) was expressly recognized as a good authority. No case has ever gone so far as to hold that delivery of a stock certificate or any document of title to registered stock or shares is sufficient to make a good *donatio mortis causa*. It may be reasonable so to hold, but that must be by the Court of Appeal: *Kiddill v. Farnell* (5); *Lambert v. Overton*. (6) The case before Sargant J. (7) and *In re Taylor* (8) were decisions *ad hoc*, and not decided upon any general principle.

Clayton K.C. and *W. F. Swords* for another defendant,

(1) [1915] 1 Ch. 195, 203.

(2) 44 Ch. D. 76.

(3) 1 Bli. (N. S.) 497.

(4) 2 Ves. Sen. 431.

(5) (1857) 26 L. J. (Ch.) 818.

(6) (1864) 11 L. T. 503.

(7) [1915] 1 Ch. 195.

(8) 56 L. J. (Ch.) 597.

adopted the same argument. The evidence in favour of the gift has to be closely sifted, and the expression by the donee in her letter of October 29, 1919, showed that death after an operation was contemplated, and that condition was not fulfilled.

Hewitt K.C. and *Brydges* ; *H. B. Vaisey* for other defendants.

EVE J.
1921
RICHARDS,
In re.
JONES
v.
REBBECK.

EVE J. The question I have to decide is whether the handing to Miss Rebbeck by the testator of these Victory Bonds on October 18, 1919, constituted a good *donatio mortis causa*. It involves both matters of fact and law. First, has the claimant established the facts necessary to support such a gift? Secondly, was the gift conditional upon death taking place in a particular manner or in particular circumstances? And thirdly, were the bonds capable of being made the subject of the gift alleged, or, in other words, was the gift a complete *donatio mortis causa* or only an abortive attempt to make such a gift? The evidence, as is not unusual in such cases, is that of the donee alone. [His Lordship read the material evidence from the affidavit of Miss Rebbeck.] Am I to accept that as a true statement of what took place? That the lady is to be treated as a truthful witness is shown by the fact that she has not been cross-examined by any of the parties, but it is said she may well be labouring under a misapprehension as to the exact language used by the testator, seeing that she was speaking of events two years old; and in support of this suggestion attention was directed to two letters written by her, the first to Mr. Davies shortly after the death and the second at a later date, in reply to an inquiry made of her by the plaintiff's solicitors. [His Lordship read the words relied upon from the letter of October 29, 1919, which was a purely voluntary statement, and also extracts from the letter of March 5, 1920, to the plaintiff's solicitors.] Comparing these two letters, I think there is not the smallest doubt that the lady meant by each of them to convey to those to whom she wrote that the testator intended her to keep these bonds, in the event of his death, for herself beneficially. Apart from the reference to the operation which gives rise to the question whether the gift was conditional upon death in certain

EVE J.
1921
RICHARDS,
In re.
JONES
v.
REBECK.

circumstances, I see no discrepancy in the statements contained in the affidavit and the letters, and subject to that question there is, in my opinion, clear and satisfactory evidence that the testator intended that the lady should retain these bonds for herself in the event of his death.

The second question arises on the parenthetical expression contained in the letter of October 29, 1919: "I mean, of course, the operation." The suggestion that the writer is here repeating the substance of something the testator had himself said would have carried more weight had the writer been cross-examined on that point. I do not myself read the statement as one made by the testator, but rather as embodying the writer's view that his death would probably be caused by or in the course of the impending operation. In these circumstances one must examine the condition of things prevailing at that time and ascertain whether the donatio was really conditional upon death from a particular cause. The testator was grievously ill suffering from neurasthenia and aggravated stone, and if his life was to be prolonged it was necessary for him to undergo an operation. He had been for some time an inmate of a nursing home, but was very unhappy there, and having left that establishment he went to the hotel at Bath, where he ultimately died. In October he was in a pitiable condition, so feeble that a few days before his death he dislocated his knee in getting up from his chair after dinner. As a result he had to take to his bed and never got up again. It is impossible to read what is stated about his condition in October, and in particular on the day of the gift, without realizing that he was a dying man conscious that the end was rapidly approaching. It was too late for any operation to take place, and no one knew this better than the testator himself. In that condition of things I cannot bring myself to hold that he ever contemplated that the gift should only take effect if he died under the operation and should not take effect if he died of the combination of maladies from which he was then suffering. There was not in my opinion any condition avoiding the gift in the event of death not taking place by reason of the operation.

The remaining question whether these bonds were good subject matter of a donatio mortis causa is, I think, disposed of by the judgment of the Court of Appeal in *In re Dillon*. (1) They were registered bonds, and the delivery gave no legal title to the donee, but each bond not only acknowledges receipt of the money but expresses all the terms on which the money is held and shows the whole contract between the Government and the lender. Attached to each bond are a number of coupons payable to bearer, and a docket or talon enabling the bearer to obtain a new set of coupons when the first set is exhausted. The documents appear to me to be similar in every way to the deposit note held to be a good subject of a donatio mortis causa in *In re Dillon*. (1) I think this is even a stronger case than that was for holding as I do that there has been a good gift mortis causa and that it is the duty of the executors to give effect thereto by such transfer as will enable the donee to be registered as the owner of the bonds.

EVE J.
1921
RICHARDS,
In re.
JONES
v.
REBECK.

Solicitors : *Kerly, Sons & Karuth ; Churchill, Smallman & Co. ; Guscotte, Wadham, Tickell & Co., for Davies & Prichard, Cardiff ; Metcalfe, Sharpe, & King, for D. O. Thomas, Swansea ; Rhys Roberts & Co., for J. T. Richards, Cardiff ; Mills, Curry & Gaskell.*

(1) 44 Ch. D. 76.

G. M.

ASTBURY
J.

In re MACARTNEY.

1921

MACFARLANE *v.* MACARTNEY.

Feb. 3.

[1914. M. 1817.]

Conflict of Laws—Foreign Judgment—Enforcement—Affiliation Order against deceased Father's Estate—Public Policy—Cause of Action unknown in England—Final and Conclusive.

A valid foreign judgment in personam cannot be enforced in England in (inter alia) the following circumstances:—

(a) If it is contrary to public policy—e.g., by recognizing the right of an illegitimate child to perpetual maintenance against the putative father and his estate.

(b) If the cause of action is unknown in England—e.g., the right to a posthumous affiliation order.

(c) If the judgment is not final and conclusive as to the amount payable—e.g., if the maintenance can be varied or terminated according to the child's circumstances.

Rousillon v. Rousillon (1880) 14 Ch. D. 351 applied as to (a).

De Brimont v. Penniman (1873) 10 Blatchford's Circuit Court Reports, 436 applied as to (b).

Nouvion v. Freeman (1889) 15 App. Cas. 1 as interpreted by *Harrop v. Harrop* [1920] 3 K. B. 386 applied as to (c).

CLAIM in administration action.

On February 15, 1913, the testator who was domiciled in England died in Malta, leaving a Maltese fiancée to whom he was to have been married on February 20 enceinte of a posthumous daughter who was ultimately born on September 19.

On May 1, 1914, the plaintiff, one of the executors, proved the will in England, on January 18, 1915, an administration decree was made, and on April 13, 1917, the assets were ordered to be lodged in Court.

A claim was made by the fiancée as a judgment creditor under a judgment of the Court of Appeal in Malta dated July 7, 1920.

The particulars of this claim were as follows:—

On November 7, 1916, the claimant obtained authority from the Maltese Court to institute proceedings on behalf of the infant against the testator's estate for a declaration of

paternity and fixing of maintenance, and on February 6, 1917, ASTBURY Page was appointed curator to represent the testator's estate and he and the curator of an infant legatee were made defendants to the action—Citation No. 91 of 1917.

J.
1921
MACARTNEY,
In re.

A preliminary plea to the jurisdiction was disallowed by the Court of first instance on January 11, 1918, and by the Court of Appeal on July 23, 1919.

MACFARLANE
v.
MACARTNEY.

On April 12, 1920, by which time the claimant was married to an Englishman living at Woolwich, the Court of first instance allowed the claim on the merits and fixed the child's maintenance payable to the claimant every six months in advance from the filing of the citation at 150*l.* a year.

On July 7, 1920, the Court of Appeal declared that the infant was the natural daughter of the claimant and the testator and condemned the testator's estate to provide the infant with an alimentary allowance of 75*l.* payable from six months to six months and to run from the filing of the citation, i.e., January 29, 1917.

On July 15, 1920, Adrian Dingli, an expert in Maltese law, advised on the jurisdiction and on the nature and effect of the first three judgments, and his opinion was accepted as applicable to the last Court of Appeal confirmatory judgment, which he had not in fact seen.

As to the jurisdiction he advised that art. 749 of the laws of organization and civil procedure of Malta laid down the causes subject to the jurisdiction of Maltese tribunals. They were (*inter alia*) causes concerning those persons wherever domiciled and of whatever nationality who had contracted an obligation towards a British subject, provided the judgment could be executed in Malta. In the present case the claimant was a British subject, the curator represented the estate of a British subject, and assets were deliberately retained in Malta so as to render at any rate partial execution of the judgment possible. The obligation on which the case was founded was one arising from a principle adopted by the Maltese law and was of a quasi-delictual character. The Court of Appeal on the jurisdiction point argued that in dealing with obligations of this character, the personal law of the

ASTBURY J. 1921
MACARTNEY, *In re.* defendant was immaterial, the *lex loci actus* being the only criterion. If the English Courts thought that jurisdiction was rightly assumed, he thought they would recognize the judgments as conclusive and binding.

MACFARLANE v. MACARTNEY. As to the nature of the proceedings he explained that by Maltese law illegitimate children had a right to inquire into their parentage and the Court's judgment declaring a defendant the putative father carried with it financial consequences on which the Court pronounced. He was obliged to provide whatever was strictly necessary for the child's board, clothing and shelter estimated in accordance with the mother's social position. The obligation continued for the child's life and at the father's death bound the inheritance. The judicial investigation was not prevented by the previous death of the putative father, but the action could, as in the present case, be brought against the representatives of the estate. The obligation might be terminated if the father could show that the child was no longer in need of the provision—e.g., if a child adopted a calling producing a sufficient income, or if female married so that her husband became liable to maintain her.

As to the effect of the order of April 12, 1920, he said that execution could at once be levied on assets in Malta, but as to assets outside the jurisdiction the Maltese judgment must first be recognized as conclusive and binding by the Court of the country where those assets were situated. The child could not claim any definite assignment of any part of the testator's estate to guarantee future payments but the heirs—i.e., the holders of the inheritance—were jointly and severally bound to provide the pension, and the child might adopt measures of enforcement against all or any of them, and they should not take the risk of dispersing the assets without providing a sufficient fund to meet it.

The claim was referred to the Court under Order LV., r. 69.

Howard Wright for the executor plaintiff. A posthumous affiliation order with maintenance against a deceased father's

estate is unknown to the English law. The judgment is ASTBURY J. therefore unenforceable: Dicey on the Conflict of Laws, 2nd ed., pp. 411, 414; *De Brimont v. Penniman*. (1) 1921

Apart from this, it is against the policy of our law to recognize the rights of illegitimate children to perpetual maintenance. The judgment is therefore against public policy MACARTNEY, In re. MACFARLANE v. MACARTNEY. and as such unenforceable: *Rousillon v. Rousillon*. (2)

Ashton Cross for legatees. As the liability can be determined or presumably varied on any change in the child's circumstances, the judgment is not final and conclusive and cannot be enforced: Dicey, p. 412; *Nouvion v. Freeman* (3); *Harrop v. Harrop*. (4)

Lawrence Tooth for the claimant. The possible exception submitted and queried in Dicey, pp. 411, 414, is limited to judgments in personam. The present judgment is a posthumous declaration of paternity involving financial consequences against the estate. That is a judgment or quasi-judgment in rem to which the fixing of the actual maintenance is purely ancillary.

The real question decided was a question of succession to an inheritance. The Court held that the child succeeded to 75*l.* a year out of the estates. That would bind the Maltese assets whatever the testator's domicile: Dicey, p. 391.

Even if the judgment is treated as in personam Dicey's possible exception is unsupported by English authority. *De Brimont v. Penniman* (1) (quantum valeat) turned on the liability being purely local and provisional. But the judgment here is obviously intended to be extra-territorial and permanent, subject to variation of the actual maintenance required. The claimant and the estate per the curator were both parties to the proceedings.

The judgment is not a penal judgment: *Huntington v. Attrill* (5), and there is no real objection on the ground of public policy to enforcing it. The principles on which foreign

(1) 10 Blatchford's Circuit Court Reports, 436.

(2) 14 Ch. D. 351, 369.

(3) 15 App. Cas. 1, 9, 13.

(4) [1920] 3 K. B. 386, 399.

(5) [1893] A. C. 150.

ASTBURY judgments are enforced are summarised in *Rousillon v. J. Rousillon*. (1)

1921

MACARTNEY,
In re.

MACFARLANE
v.
MACARTNEY.

Lastly this judgment is a final and conclusive *res judicata* on the merits. It finally decides the paternity with the consequential liability of the estate to provide sufficient maintenance. The fact that the maintenance may be varied according to the child's requirements is immaterial. Until varied it can be enforced at 75*l.* a year. Otherwise no English judgment for a wife's alimony could ever be enforced out of the jurisdiction. (2)

Nouvion v. Freeman (3) was an entirely different case. The remate judgment was merely a summary executive judgment on the document as it stood, with very limited rights of defence. The general merits were not dealt with, and the judgment was in no sense treated as *res judicata* in plenary proceedings on the merits in which the document might be impeached for fraud or otherwise. It was naturally held that such a judgment was not final and conclusive.

Harrop v. Harrop (4) may possibly be supported on the ground that the foreign judgment could not be enforced without a foreign magistrate's order. But in treating the mere variation of the quantum of maintenance according to the child's requirements as an abrogation or variation of the original judgment on the merits within the meaning of *Nouvion v. Freeman* (3) it goes far beyond that authority, and should not be followed.

ASTBURY J. [after stating the facts and reading the foreign judgments and Mr. Dingli's opinion]. I gather that if the judgment had been made during the testator's life it would have been in personam. It is true that there are certain expressions in the judgment and opinion which give colour to the theory that if made after the testator's death it would have bound the assets. But all that is meant is that the

(1) 14 Ch. D. 351, 370, 371.

and distinguished in *Keys v. Keys*

(2) See *Nunn v. Nunn* (1880) 6 [1919] 2 I. R. 160.

L. R. Ir. 115; 8 ib. 298; discussed (3) 15 App. Cas. 1, 9, 13.

(4) [1920] 3 K. B. 386, 399.

judgment gives rise to an obligation binding the testator's representatives, and enforceable as such. ASTBURY
J.

The question is to what extent this foreign judgment is enforceable. In Dicey on the Conflict of Laws, 2nd ed., p. 391, it is stated that (r. 89) : "The Courts of a foreign country have jurisdiction to administer, and to determine the succession to, all immovables and movables of a deceased person locally situate in such country. This jurisdiction is unaffected by the domicile of the deceased"; and (r. 90) : "The Courts of a foreign country have jurisdiction to determine the succession to all movables wherever locally situate of a testator or intestate dying domiciled in such country." 1921
MACARTNEY,
In re.
MACFARLANE
v.
MACARTNEY.

Where however the defendant is not domiciled in the local jurisdiction it is stated (p. 411, r. 102) that : "Subject to the possible exception hereinafter mentioned, a valid foreign judgment in personam may be enforced by an action for the amount due under it if the judgment is (1.) for a debt, or definite sum of money, and (2.) final and conclusive, but not otherwise."

The "possible exception hereinafter mentioned" is stated at p. 414 : "An action (semble) cannot be maintained on a valid foreign judgment if the cause of action in respect of which the judgment was obtained was of such a character that it would not have supported an action in England?"

On this point there appears to be no direct English authority. The action is not a penal action, nor is the cause of action so directly contrary to general morality as on that ground alone to be refused recognition in this country. It is however not only a claim of a character which raises no cause of action in this country, but in my judgment its recognition is contrary to public policy, because the general recognition of the permanent rights of illegitimate children and their spinster mothers as recognized in Malta is contrary to the established policy of this country, especially having regard to the fact that the child's interest is not confined to minority.

In *Rousillon v. Rousillon* (1) it was held that "If an agreement contrary to the policy of the English law is entered into

ASTBURY J. in a country by the law of which it is valid, an English Court will not enforce it " and Fry J. said "[counsel] has insisted that, even if the contract was void by the law of England as against public policy, yet, inasmuch as the contract was made in France, it must be good here, because the law of France knows no such principle as that by which unreasonable contracts in restraint of trade are held to be void in this country. It appears to me, however, plain on general principles that this Court will not enforce a contract against the public policy of this country, wherever it may be made. It seems to me almost absurd to suppose that the Courts of this country should enforce a contract which they consider to be against public policy simply because it happens to have been made somewhere else." That passage applies directly to the non-enforceability of foreign judgments founded on contracts contrary to public policy or rights of that character. There are other passages (1) as to the principles on which foreign judgments are enforced, which though valuable I need not read.

If I am right in believing that the recognition of the present judgment is contrary to public policy, *cadit quæstio*. If I am wrong, the question arises whether the possible exception in Dicey, p. 414, is well founded, in other words, whether the mere fact that the Maltese judgment is founded on a cause of action not recognizable here prevents its enforcement.

In *De Brimont v. Penniman* (2) the actual point was considered by Woodruff J., Circuit Judge of the Southern District of New York. Though not binding in England, the judgment is well worthy of consideration. In that case a French citizen married in France the daughter of two United States citizens. The wife died leaving a child. Under French statute law a father-in-law and a mother-in-law must make an allowance to a son-in-law who is in need so long as a child of the marriage is living. Under this law the husband obtained a French Court judgment or decree against the wife's parents then

(1) 14 Ch. D. 370, 371.

(2) 10 Blatchford's Circuit Court Reports, 436, 439.

residing in France requiring them to pay him a certain annual allowance, one-third for himself and two-thirds for the child. The husband sued the wife's parents in the American Court to recover arrears on this judgment. Woodruff J. held that the suit could not be maintained. The headnote summarises the judge's reasons as follows: "The laws of France upon which such decree was made, and such decree founded thereon, are local in their nature and operation. They are designed to regulate the domestic relations of those who reside there, and to protect the public against pauperism. They have no extra-territorial significance, but must be executed upon persons and property within their jurisdiction. Such orders of the French tribunals are in this respect like orders of filiation, and orders made, under local statutes, to guard against pauperism, and in the nature of local police regulations, and are not founded upon principles which, irrespective of local statutes, are of universal acceptance, like judgments for a sum certain, founded upon contracts or other recognised private rights." Woodruff J. said: "The question is novel. No case has been cited . . . in which a foreign judgment of such a nature has been the subject of an action in this country, or in England. . . . In determining the precise question, whether, . . . the plaintiff shows a cause of action, it may not be material to decide, whether such a judgment is, in this Court, to be regarded as conclusive, or only *prima facie*, evidence of the indebtedness claimed. . . . The cases, therefore, which discuss that distinction need not be considered. . . . The decree in question proceeds upon the declaration of an obligation not in conformity with our laws, not known to the common law, and upon the continuance of the obligation itself after the relationship out of which it is deemed to have arisen has ceased by the death of the person through whom the affinity was traced. The nearest analogy . . . is a decree for alimony, where a divorce . . . has been granted; but, the only cases in which such a decree has been held to support an action in another jurisdiction are under the influence of the Constitution of the United States. . . . The decree in question . . . does not proceed upon the rule

ASTBURY
J.

1921

MACARTNEY,
In re.

MACFARLANE

v.
MACARTNEY.

ASTBURY of obligation recognised by all civilised nations, that the
 J. parent shall support his children during minority.
 1921 Whatever obligation or duty lies at the foundation of the
 MACARTNEY, claim is the creature of positive statute, framed for the
In re. people of France, to regulate their domestic concerns, protect
 MACFARLANE the public, and guard against pauperism and its evils.
 v. MACARTNEY. Statutes in some respects similar are found in England, and
 — in most, if not all, of the States of this country. The duty
 of parents to provide for the necessary support of those
 relatives, and prevent their becoming a charge to the public,
 is declared and is enforced. Such regulations are local in
 their nature, and in their application, and so are the orders
 for their enforcement. Orders of filiation are of a
 similar character. The principle upon which foreign
 judgments receive any recognition in our Courts, is one of
 comity. It does not require, but rather forbids it, when
 such a recognition works a direct violation of the policy of our
 laws, and does violence to what we deem the rights of our own
 citizens. The Courts will be slow to hold, that when-
 ever an American citizen shall visit France, and reside there
 temporarily, with his family, his son or his daughter, by a
 rash or imprudent marriage, can cast upon the parents,
 mother as well as father, the perpetual burthen of an annuity
 for the support of the wife or husband. So long as such
 residence continues, no doubt, the parents must submit to
 the laws of France. The orders of her Courts may be enforced
 against them, as those laws may prescribe ; but, in a matter
 of this kind, those laws must be executed there, and such
 decrees can have, and ought to have, no extra-territorial
 significance. They rest upon no principles of universal
 acceptation, like the obligation of contracts, or the protection
 of generally recognised, private, personal rights. No dis-
 position to deal with foreign judgments, so as to promote
 the ends of justice, demands that such decrees should be
 arbitrarily enforced in our Courts." That is a lucid explana-
 tion of the rule. It exactly applies to the present case, and
 I adopt and follow it.

There is however another ground which is sufficient to

prevent the enforcement of this judgment—namely, because it is not final and conclusive. ASTBURY
J.

“The reason for this is that ‘to give effect in this country to a judgment [which is not final in the country where it is given] would enable the plaintiff to obtain in this country a greater benefit from it than he could obtain from it in [the country where it is given]. It would be entirely contrary to the principle on which the English Courts proceed in enforcing a foreign judgment, if we were to adopt that course.’”: Dicey, p. 412; *Nouvion v. Freeman* (1), per Cotton L.J. 1921
MACARTNEY,
In re.
MACFARLANE
v.
MACARTNEY.

“The test of finality is the treatment of the judgment by the foreign tribunal as a *res judicata*. ‘In order to establish that [a final and conclusive] judgment has been pronounced it must be shown that in the Court by which it was pronounced, it conclusively, finally, and for ever established the existence of the debt of which it is sought to be made conclusive evidence in this country, so as to make it *res judicata* between the parties’”: Dicey, p. 412; *Nouvion v. Freeman* (2), per Lord Herschell. “‘No decision has been [or can be] cited to the effect that an English Court is bound to give effect to a foreign decree which is liable to be abrogated or varied by the same Court which issued it. All the authorities cited appear to me, when fairly read, to assume that the decree which was given effect to had been pronounced *causa cognita*, and that it was unnecessary to inquire into the merits of the controversy between the litigants, either because these had already been investigated and decided by the foreign tribunal, or because the defendant had due opportunity of submitting for decision all the pleas which he desired to state in defence’”: Dicey, p. 412; *Nouvion v. Freeman* (3), per Lord Watson.

Now according to the Maltese law the maintenance awarded by the judgment may be varied from time to time or terminated according to the circumstances of the child. [His Lordship referred to Mr. Dingli's opinion.] It is impossible therefore to say that there is any permanent debt.

(1) 37 Ch. D. 249.

(2) 15 App. Cas. 9.

(3) 15 App. Cas. 13.

ASTBURY J. In *Harrop v. Harrop* (1) Sankey J. had to consider a somewhat similar question and taking the same view of *Nouvion v. Freeman* (2) that I do held that a somewhat similar judgment in *Perak* was not final and conclusive.

1921
MACARTNEY,
In re.

MACFARLANE v. MACARTNEY. The claimant contends that the judgment is a judgment in rem and therefore enforceable. The declaration as to paternity determines the status of the child and is clearly in rem, but so far as the judgment imposes any obligation on the assets to meet the 75*l.* a year maintenance, it is, notwithstanding its language, a mere judgment in personam against the curator appointed to represent the estate. It may be operative against assets in Malta, and nothing I have said will interfere with that. But it is unenforceable against assets in the possession of the legal personal representative here. As regards the maintenance awarded it is at most a judgment in personam, and in no sense a judgment in rem. There is therefore no debt enforceable against the testator's assets here, and the claim must be disallowed.

Solicitors : *Budd, Johnson, Jecks and Colclough ; Frere, Cholmeley & Co. ; H. A. Graham & Wigley.*

(1) [1920] 3 K. B. 386, 399.

(2) 15 App. Cas. 1, 9, 13.

In re WEST.ASTBURY
J.DENTON *v.* WEST.

1921

Feb. 16.

[1920. W. 950.]

Hotchpot—Life Interest in Entirety—Defeasible reversionary Life Interest in a Moiety—Liability to Hotchpot—Mode of Valuation.

The donee of a limited power died in 1886 having by her will appointed the entire fund, producing about 270*l.* a year, in trust for T. for life, and after her death on the usual trusts for her issue and children and in default of such issue or children, in trust as to one moiety for G. for life with further trusts that failed.

Under the deed creating the power T. and G. each took 1000*l.* in default of appointment, subject to the usual hotchpot clause.

G. died in 1915 without issue. T. died in 1920 without issue, and the fund became distributable.

Held, that T.'s estate must bring her life interest in the entirety into hotchpot.

Held, also, that G.'s estate was not liable to bring anything into hotchpot for two reasons:—

(a) Because G. being only given a defeasible reversionary life interest, did not at any time "take" any appointed part or share within the meaning of the hotchpot clause.

(b) Even if she theoretically did so at the appointor's death in 1886, it would be unfair and inequitable now to assess a retrospective actuarial value thereon without regard to the actual fact that her defeasible reversionary life interest had never fructified.

In retrospective actuarial calculations of values at a past epoch, the subsequent facts, rather than the original probabilities, should as far as possible be taken as the data.

Rucker v. Scholefield (1862) 1 H. & M. 36; *Eales v. Drake* (1875) 1 Ch. D. 217; *In re Heathcote* [1891] W. N. 10; and *In re Westropp* (1903) 37 Ir. L. T. 183, considered.

ORIGINATING SUMMONS.

By a voluntary settlement dated June 27, 1865, certain funds producing about 270*l.* a year were settled in trust for a mother for life, and after her death in trust for her four younger children, William, Georgiana, Florence and Theresa, or their issue, in such shares and in such manner as the mother should by deed or will appoint, and in default of appointment in trust to raise and pay 1000*l.* apiece to Georgiana, Florence and Theresa, and as to the residue in trust for William absolutely.

ASTBURY
J.

1921

WEST,
In re.

DENTON

v.
WEST.

The usual hotchpot clause provided that no one of them the said William Georgiana, Florence, and Theresa, "who or whose issue shall take any part of the said trust premises under any appointment in pursuance of either of the powers lastly hereinbefore contained shall, in default of appointment to the contrary, have or be entitled to any share in, or to any sum of money raiseable out of, the unappointed part of the said trust premises under the said trust in default of appointment without bringing the share or shares appointed to him or her or to his or her issue into hotchpot and accounting for the same accordingly."

By her will dated August 2, 1873, the mother, after reciting that Georgiana and Florence were sufficiently provided for, and that William had come into possession of considerable property, and that she wished to place Theresa on an equal footing in point of fortune with her other daughters, appointed that the settlement trustees should from her decease stand possessed of the trust property in trust for Theresa for life, and after her death in trust for her issue as she should by deed or will appoint, and in default of appointment in trust for her children who, being sons attained the age of 21, or being daughters attained that age or married. And in default of such issue or children in trust as to one moiety for Georgiana for life, and after her death in trust for her issue and children as in Theresa's case, and in default of such issue or children upon the trusts of the second moiety. But as to the second moiety in trust for Florence for life, and after her death in trust for her issue and children as in Theresa's case, and in default of such issue or children upon the trusts of the first moiety.

The mother died on September 18, 1886.

Florence died a spinster on June 1, 1906, having appointed William her executor and universal legatee.

Georgiana married, but died on February 7, 1915, without having had any issue.

William died on July 4, 1917, having appointed the plaintiff his executor.

Theresa died a spinster on October 4, 1920, and the

settlement funds became distributable under the trust in default of appointment.

Apart from the hotchpot clause the estates of Theresa and Georgiana would each have taken 1000*l.*, the rest going to William's estate directly or as to 1000*l.* through Florence.

This summons was issued to determine (a) whether Theresa's life interest in the entirety, and (b) Georgiana's reversionary life interest in a moiety which never took effect in possession ought to be brought into hotchpot against their respective sums of 1000*l.*, and if so, how those life interests ought to be valued. No question arose as to Florence as her estate had already gone to William.

Gavin Simonds for the plaintiff representing the estates of William and Florence. Theresa's life interest in the entirety must be brought into hotchpot. The mode of valuation is immaterial, as however valued, her 1000*l.* will be swamped.

Georgiana's reversionary life interest must be taken at the value that an actuary would have put upon it at the mother's death, before the events were known—i.e., at its then market value: *Rucker v. Scholefield* (1); *Eales v. Drake* (2); *In re Heathcote* (3); *In re Westropp*. (4)

F. E. Farrer for Theresa's estate. Theresa did not take any appointed part or share, or a life interest in any part or share, of the trust fund. She took a life interest in the entirety. There is no authority that such a life interest is a part or share subject to hotchpot. The hotchpot clause postulates a quasi-spatial division into parts or shares. It does not apply to a mere time division. No doubt where, as in all the cases cited, there is an actual division into shares, the life interest in a share is caught. But apart from such a division, the clause is inapplicable. Theresa had a vested interest in the 1000*l.*, and the onus is on William to displace it: *Wombwell v. Hanrott*. (5)

In any case, having regard to the recitals, the will shows an intention against hotchpot.

(1) 1 H. & M. 36.

(2) 1 Ch. D. 217.

(3) [1891] W. N. 10.

(4) 37 Ir. L. T. 183.

(5) (1851) 14 Beav. 143, 149.

ASTBURY
J.
1921
WEST,
In re.
DENTON
v.
WEST.
—

ASTBURY J. If I am wrong, I admit that the question of valuation is immaterial.

1921
WEST,
In re.
DENTON
v.
WEST.

Farwell for Georgiana's estate. In *Eales v. Drake* (1) the only reversionary interests were absolute and indefeasibly vested, and as one reversioner, Charles, did not take under the trust in default of appointment, and Harriet, who took 5*l.* plus her reversion by appointment, only took 5*l.* in default, it is difficult to see why either reversion should have been brought in.

There is no authority that a reversionary interest unless absolute and indefeasibly vested must be brought into hotchpot. If, however, it is to be brought in, it must be valued as at the mother's death, but as far as possible according to the events that have actually occurred and not on a purely hypothetical basis: Jarman on Wills, 6th ed., p. 1180; *Wheeler v. Humphreys* (2); *In re Kelly*. (3)

The proper question for the actuary would be: "What, having regard to the events that have actually occurred, was the value of Georgiana's reversionary life interest on September 18, 1886."

In this case the answer would clearly be "Nil."

Alec. H. Christie for a settlement trustee.

Simonds in reply. The parties were entitled to have their original interests ascertained and defined at the mother's death, and their delay in doing so does not alter those original interests. Theresa was then a spinster of 45. Her life interest could have been valued accordingly. Georgiana was about 40. She had then a vested life interest in reversion, defeasible if a spinster of 45 died without issue who attained a vested interest. Any competent actuary could have made a fair estimate of the market value at that date, and could do so now retrospectively on the same basis.

In *In re Heathcote* (4) the lives were in being so that actuarial valuations were a matter of course, but in *In re Westropp* (5), although the life interest expired in 1888,

(1) 1 Ch. D. 217.

(3) [1910] 1 Ch. 78.

(2) [1898] A. C. 506.

(4) [1891] W. N. 10.

(5) 37 Ir. L. T. 183.

Ross J. in 1903 directed an actuarial calculation of the value of the life interest as at or from the appointor's death in 1866.

ASTBURY
J.
1921
WEST,
In re.
DENTON
v.
WEST.

ASTBURY J., after stating the facts. The main question is as to Theresa, who took a life interest in the entirety and survived her two sisters.

Her executor contends that her 1000*l.* must be paid intact for two reasons: (a) because Theresa did not take any appointed share or shares within the meaning of the hotchpot clause, and (b) because her mother's will showed an intention against hotchpot.

Neither of these contentions is sound. The mother who had a clear power to appoint the capital and income to the objects, exclusively or otherwise as she wished, appointed the whole to Theresa for life with remainder to her issue, which remainder failed to take effect, with reversionary life interests and remainders in moieties to her two sisters and their issue, none of which took effect, as the two sisters predeceased Theresa without issue. Subject therefore to Theresa's life interest which has now ceased, the trust fund has gone in default of appointment.

Now the hotchpot clause provides that no one of the four named children who or whose issue shall take "any part" of the trust premises under any appointment shall, "in default of appointment to the contrary," be entitled "to any share in, or to any sum of money raiseable out of the unappointed part" without bringing the appointed "share or shares" into hotchpot. In my view it is quite impossible to contend that Theresa, to whom the life interest in the entirety was appointed, did not take any part or any share under the appointment. The hotchpot clause therefore applies and, as the will really shows no contrary intention, the life estate must be brought into hotchpot. The question how it is to be valued is immaterial, as on any method it will swamp the 1000*l.*

The question as to Georgiana's reversionary life interest is more difficult. As she predeceased Theresa she never in

ASTBURY fact attained any interest in possession in the settled fund under the appointment.

J.
1921

WEST,
In re.

DENTON

v.
WEST.

The answer to this question depends on many considerations, the most important being the true construction of the hotchpot clause which I have already read. In the ordinary common-sense view Georgiana never "took" any part under the appointment. She was given a reversionary life interest subject to Theresa's life and the failure of Theresa's issue or children to attain a vested interest. This was practically though perhaps not technically a contingent reversionary life interest dependent on her surviving Theresa and on Theresa having no issue or children who attained a vested interest, and in my opinion Georgiana did not at any time "take" any part of the trust premises within the true meaning of the hotchpot clause.

The plaintiff contends that she took a vested reversionary life interest liable to be divested if Theresa's issue or children attained a vested interest, and that in any case the value of her reversionary life interest, whether contingent, or vested and liable to be divested, ought to be actuarially calculated as at the appointor's death on September 18, 1886, and that value brought into hotchpot. How such a calculation could have been made it is difficult to understand. The three daughters were living. Theresa was 45 years old and might have had children, and William and the other daughters might or might not have predeceased her. It is extremely difficult to imagine on what basis a valuation of Georgiana's interest could have been made. It is true that life interests must be brought into hotchpot, and that in certain cases actuarial calculations, in default of any other possible method, must be adopted. But on this point it is important to consider the authorities carefully in order to ascertain what they really decide.

In *Rucker v. Scholefield* (1) the hotchpot clause of a marriage settlement provided that "no child taking under any appointment . . . shall be entitled to any share of the unappointed part . . . without bringing his or her appointed share into

(1) 1 H. & M. 36, 42.

hotchpot unless such appointment shall contain an express direction to the contrary." In 1844, there being four sons and five daughters, objects of the power and entitled in default of appointment, one fifth of the fund was appointed by deed after the death of the husband and wife to each daughter for life with void limitations over. The wife survived the husband and died in 1861, leaving the nine children living. In an action to administer the trusts of the settlement in 1862 Wood V.-C. said: "It is clear that a life interest may come into hotchpot as well as any other [interest]. The power . . . includes the power to appoint life interests, and though it was urged that it could not have been intended that the hotchpot clause should extend to life interests, it is impossible to accede to that argument. Each daughter, therefore, taking her life interest, must bring her share into hotchpot, and the life interest must be valued for this purpose."

ASTBURY
J.
1921
WEST,
In re.
DENTON
v.
WEST.

In that case there were existing life interests each capable of valuation in the ordinary way, and subject to those interests the whole fund went in default of appointment.

In *Eales v. Drake* (1) Jessel M.R. is reported to have said: "It is quite clear that both life interests and reversionary interests must be brought into hotchpot. The value of them must be ascertained in the best way you can; and if you cannot agree, there must be an inquiry." The Law Journal and the Weekly Reporter do not mention reversionary interests, and it is not easy to ascertain from the Law Report to what reversionary interests Jessel M.R. was alluding. Under the will and codicil of the appointor who died in 1874, John had a life interest in 4000*l.*, the reversion on which (omitting the lapsed testamentary appointment in reversion to George) was appointed to Charles and Harriet in equal shares—i.e., 2000*l.* apiece absolutely. These vested absolute reversions may have been the reversionary interests intended. But, if so, the Court must have forgotten the trust in default of appointment in the 1856 settlement under which the unappointed fund which in the

(1) 1 Ch. D. 217, 219; 45 L. J. (Ch.) 51; 24 W. R. 184.

ASTBURY J. 1921 WEST, *In re*. DENTON v. WEST.

event was 1000*l.*, went as to 5*l.* to Harriet and as to the residue to George and John in equal shares. George's estate was no doubt liable to bring in the 3000*l.* previously appointed to him by deed in 1860, and John, as the Court held, was liable to bring in his life interest. But as Charles took nothing in default of appointment, he was not liable to bring in anything at all. Harriet, on the other hand, no doubt took 5*l.* under the trust in default of appointment, but as she also took 5*l.* by appointment, as well as her vested absolute reversionary interest in 2000*l.*, the valuation of her reversionary interest for hotchpot was *prima facie* a mere work of supererogation.

In these circumstances the point as to reversionary interests did not really arise, and in any case the judgment or dictum, whichever it may be, must on the facts be confined to absolute and indefeasibly vested reversionary interests. No indication as to the date or mode of valuation of the life interest or reversion is given.

In *In re Heathcote* (1) funds were settled upon trust for the settlor's children as he should appoint and in default for the children equally, with the usual hotchpot clause. By his will the settlor appointed the funds in equal moieties between two daughters for their respective lives with void remainders over. The question was whether the daughters' life interests ought to be immediately valued and brought into hotchpot, so that the other children's interests in the unappointed reversions might be ascertained. Kekewich J. held that the life interests must be at once valued and brought into hotchpot. It was fair to the other children that they should have their interests immediately ascertained. The value of the life interests must be calculated, not by reference to their duration, but by an actuarial valuation of them at the time they first took effect—i.e., at the settlor's death.

In that case, it is difficult to see how any other course could have been adopted. The appointed life interests came into existence at the settlor's death, and the persons entitled

(1) [1891] W. N. 10.

to the unappointed reversions, which were vested absolute reversions, were entitled to have their interests immediately ascertained. This could only be done by an actuarial valuation.

In *In re Westropp* (1) a testator with power to appoint 8000*l.*, portions charged on Irish lands, appointed 2000*l.* to George for life with void limitations over. The rest of the fund was appointed to other objects absolutely. The testator died on March 2, 1866. George died on August 16, 1888. On a subsequent petition for the sale of the lands it became necessary to value the portions for the purposes of the schedule of incumbrances. On the point coming before Ross J. in 1903, he said: "The proper way to ascertain the value of [George's] life estate for the purpose of hotchpot, is by obtaining an actuarial calculation of the value of his life interest in the 2000*l.* as from the date of the death of the appointor." And at the end of his judgment he declared that George's life interest was to be valued "as at the date of" the appointor's death.

In that case there was no contingency or uncertainty, and it may well be that the actuary in pursuance of this direction would have valued the expired life interest as an annuity for about 22 years certain.

I have already stated that on the true construction of the present hotchpot clause I have no difficulty in answering question 2. But if my construction is wrong, I still feel a grave difficulty in saying that where the parties interested have waited till all the lives have ceased, and have ascertained that Georgiana in fact takes nothing under the appointment, they can now say *ex post facto* that there ought to be an actuarial valuation of the value of her prospective reversionary life interest in 1886. Where the parties have neither taken nor been able to take steps to ascertain that actuarial value, until the real value has been ascertained to be nil, it does not seem fair to substitute hypothesis for fact.

This is apparently the view taken in *Jarman on Wills*,

(1) 37 Ir. L. T. 183, 185*b*, 186*b*.

ASTBURY
J.
1921
WEST,
In re.
DENTON
v.
WEST.
—

ASTBURY 6th ed., p. 1180, where it is stated: "When life and
J.
1921
WEST,
In re.
DENTON
v.
WEST.
—
reversionary interests have to be brought into hotchpot
it is difficult to say how they should be valued. In *Eales v. Drake* (1), Jessel M.R. said that their value 'must be ascertained in the best way you can.' In *In re Heathcote* (2), a case on a settlement, Kekewich J. held that the value of certain life interests, which were to be brought into hotchpot, must be calculated not by reference to the duration of the interests, but by an actuarial valuation of them at the time when they first took effect. In *Wheeler v. Humphreys* (3) the House of Lords do not seem to have considered the point, but their decision appears to involve the view that actual, and not actuarial values are to be taken. With great diffidence it is submitted that the correct method is that stated above in the case of annuities, namely, that you consider the state of facts and contingencies at the time when the life interest or reversion is to be brought into hotchpot. If you know the actual value, because the life interest has ceased, you take that; if you do not, you take the actuarial value. This method seems fair, and does not involve the difficulty that the right of parties may be seriously altered owing to the chance that there has been a delay in bringing the amounts into hotchpot. But in the light of *Wheeler v. Humphreys* (3) it is impossible to state with any confidence that this view is correct. As to the valuation of reversionary annuities where there is abatement, see *In re Metcalf*. (4) In *In re Kelly* (5) the fact that the tenant for life surrendered her life interest was held not to accelerate the period of valuation."

In my view the method of valuation indicated in this passage is correct, and even if I am wrong on my construction of the hotchpot clause, I still think that where the parties interested have chosen to wait until it is ascertained that Georgiana really took nothing under the appointment, it would be unfair and inequitable now to assess a past actuarial value

(1) 1 Ch. D. 217.

(3) [1898] A. C. 506.

(2) [1891] W. N. 10.

(4) [1903] 2 Ch. 424.

(5) [1910] 1 Ch. 78.

on the reversionary life interest given her in 1886, which ASTBURY
interest in fact never fructified. J.

I hold therefore that Georgiana's estate is not liable to
bring anything into hotchpot against her 1000*l*. 1921
WEST,
In re.

Solicitors : *Patersons, Snow & Co. for Longueville & Co.,*
Oswestry ; Bockett, Stunt & Bockett. DENTON
v.
WEST.

G. R. A.

In re CLARIDGE'S PATENT ASPHALTE COMPANY, ASTBURY
LIMITED. J.

[00194 of 1917.]

1921
Mar. , 2, 3.

*Company—Directors—Misfeasance—Transaction ultra vires the Company—
Honest Error of Judgment—Counsel's Opinion—Relief from Liability—
Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 279.*

Under s. 279 of the Companies (Consolidation) Act, 1908, a director
may be relieved from liability for "negligence or breach of trust" if he
"has acted honestly and reasonably, and ought fairly to be excused":—

Held, that the section extended to a transaction in fact wholly ultra
vires the company, but which the director, acting on counsel's considered
opinion, honestly and reasonably thought to be intra vires.

MISFEASANCE SUMMONS.

In March, 1838, an association of persons called "Claridge's
Patent Asphalte Company" was formed for the purpose of
manufacturing and laying down in Great Britain and Ireland
and the British Colonies and Possessions certain mastic,
cement, or composition patented by Claridge and for all other
purposes to which the patented invention might be found
applicable. No deed of settlement was ever executed.

On June 8, 1847, a local Act (10 Vict. c. xxxvi.) was
passed, whereby the company was enabled to sue or be
sued in the name of its secretary, or a director, but was
not incorporated.

On June 3, 1872, the company was incorporated as a limited
company under the Companies Act, 1862 (25 & 26 Vict. c. 89),
with a nominal capital of 45,145*l*. divided into 9029 5*l*. shares.

ASTBURY
J.

1921

CLARIDGE'S
PATENT
ASPHALTE
COMPANY,
In re.

No memorandum of association was adopted and there were no articles, but the company's objects as then stated were: "To manufacture and lay down in Great Britain and Ireland and the British Colonies and Possessions a mastic cement or composition applicable to paving and road-making covering buildings and various purposes to which cement mastic lead zinc or composition are employed and for all other purposes to which the invention might be found applicable."

At an extraordinary general meeting of May 26, 1874, it was resolved that the company's solicitor should prepare articles of association to be submitted for approval at an adjourned extraordinary general meeting of June 22, 1874, and the meeting was adjourned for this purpose.

At the adjourned meeting of June 22, 1874, the articles drafted by the solicitor were adopted, and on July 3, 1874, they were registered with the Registrar of Joint Stock Companies.

// These articles, though technically never properly passed or confirmed, were in fact acted upon for over forty years.

On January 1, 1914, Allback became a director. He and his then co-directors were strongly of opinion that owing to the great increase in motor traffic there was a profitable future in making tar-macadam roads, and it was proposed that the company should embark on this new business. Williamson, from whom it was necessary to get the slag, insisted on participating in one-third of the venture. It was therefore proposed to promote a subsidiary private company called Clarmac Roads, Ltd., to manufacture the materials.

Before doing anything in the matter the directors consulted the company's solicitors as to whether the proposed scheme was ultra vires. The solicitors laid a case before a well-known chancery barrister who, on June 26, 1914, advised that the scheme was not ultra vires, but suggested an alteration of art. 68 (Reserve Fund) so as to enable the directors to apply any reserve to this purpose. He also suggested one or two alterations not material hereto. On July 14 and 29, 1914, the articles were altered by extraordinary general meetings, at which the scheme was fully explained and approved.

On September 14, 1914, the Clarmac Company was registered with a capital of 6500*l.* in 1*l.* shares. ASTBURY
J.

The Claridge Company subscribed 6334*l.* in payment for 4334 shares and 2000*l.* debentures and Williamson took the remaining shares—namely, about one-third of the venture. The reserve fund being exhausted, the Claridge Company borrowed the money from its bankers. 1921
CLARIDGE'S
PATENT
ASPHALTE
COMPANY,
In re.

In July, 1915, the Clarmac Company was in financial difficulties owing to the war, and the Claridge directors, believing those difficulties to be temporary, deposited the 2000*l.* debentures with the Clarmac Company's bankers to secure an overdraft. The Clarmac Company, however, never recovered. In October, 1915, it went into voluntary liquidation and paid 6*d.* in the pound. The 2000*l.* was swallowed by the overdraft and that amount and the share subscription were lost to the Claridge Company.

On November 20, 1917, a compulsory order for winding up the Claridge Company was made on a contributory's petition. On January 31, 1918, the official receiver made his report. On March 19, 1918, a liquidator was appointed, and on October 16, 1918, Allback and the general manager were privately examined under s. 174 of the Companies (Consolidation) Act, 1908.

On March 12, 1919, the liquidator issued this summons (inter alia) for a declaration that the investment by the directors of the 6334*l.* in taking up the 4334 shares and 2000*l.* debentures in the Clarmac Company was ultra vires the Claridge Company and invalid or was a misfeasance or misapplication of the Claridge Company's funds, and that Allback was liable to repay the 6334*l.* with interest. Relief under other heads was also asked against Allback and the general manager, but as the latter did not join the company till October 25, 1915, he was not responsible under this head.

The relief was asked under s. 215 of the Companies (Consolidation) Act, 1908 (1), which came into operation on April 1, 1909.

(1) This Act provides as follows :— the course of winding up a company
Sect. 215, sub-s. 1 : " Where in it appears that any . . . director . . .

ASTBURY
J.

1921

CLARIDGE'S
PATENT
ASPHALTE
COMPANY,
In re.

Mitchell-Innes K.C. and *Swords* for the liquidator. Sect. 279 is confined to personal negligence or breach of trust. It does not apply to a transaction ultra vires the company. In such a transaction honesty is no defence: *In re Sharpe* (1); *Cullerne v. London, Etc., Building Society*. (2) The law is so stated in Buckley on Companies, 9th ed., p. 624, without any reference to the section previously set out at p. 557 and noted in the index at p. xxx. under the head "Directors, Relief to, for negligence or breach of trust." It is clear therefore that the author did not think the section applicable to acts ultra vires the company.

Even if the section is applicable, then, seeing that Allback was a paid director, not a gratuitous trustee, it is not a case in which relief should be granted: *National Trustees Co. of Australasia v. General Finance Co. of Australasia*. (3)

Luxmoore K.C. and *C. A. Bennett* for Allback and the general manager. We admit that the transaction was ultra vires: *Joint Stock Discount Co. v. Brown* (4); but, although honesty and reasonableness are no defence, Buckley, p. 624, they are a ground for relief under s. 279, a point with which the author was not dealing.

All ultra vires transactions are breaches of trust: *In re Sharpe* (5); *Marzetti's Case*. (6) The section being founded on

or officer has misapplied any money or property of the company, or been guilty of any misfeasance or breach of trust in relation to the company, the Court may, on the application of the liquidator examine into the conduct of the director or officer, and compel him to repay or restore the money or property with interest or to contribute such sum to the assets by way of compensation in respect of the misapplication, ... misfeasance, or breach of trust as the Court thinks just."

Sect. 279: "If in any proceeding against a director for negligence or breach of trust it appears

to the Court hearing the case that the director is or may be liable in respect of the negligence or breach of trust, but has acted honestly and reasonably, and ought fairly to be excused for the negligence or breach of trust, that Court may relieve him, either wholly or partly, from his liability on such terms as the Court may think proper."

The similar provision of the Companies Act, 1907 (7 Edw. 7, c. 50), s. 32, came into operation on July 1, 1908.

(1) [1892] 1 Ch. 154, 165.

(2) (1890) 25 Q. B. D. 485, 490.

(3) [1905] A. C. 373, 381.

(4) (1869) L. R. 8 Eq. 381.

(5) [1892] 1 Ch. 154, 167.

(6) [1880] W. N. 50; 28 W. R. 541.

s. 3 of the Judicial Trustees Act, 1896 (59 & 60 Vict. c. 35), must not be construed narrowly: *In re Allsop* (1), where it is pointed out (2) that the *Australasia Case* (3) was really an authority that the Court had power to grant relief where trustees had paid the wrong person, but declined to exercise it in the very special circumstances of that case.

ASTBURY
J.
1921
CLARIDGE'S
PATENT
ASPHALTE
COMPANY,
In re.

ASTBURY J. [after stating the facts]. The first claim (which does not concern the general manager) is that Allback may be ordered to make good to the Claridge Company this sum of 6334*l.* on the ground that it was a misfeasance or misapplication of the funds of that company, which had no power in law to promote the Clarmac Company, or to invest its funds in that venture.

I will assume for the purpose of deciding this point that the objects of the Claridge Company were limited as I have stated, that the original articles were invalidly passed, that the alteration advised by counsel was invalidly made and that the promotion of the Clarmac Company and the investment of the Claridge funds therein were ultra vires the Claridge Company. It is not, however, suggested that Allback and his then co-directors acted otherwise than honestly in reference to this matter. They were interested in the Claridge Company developing its business; they thought there was a great future in tar road making, and that it would be in the interest of their own company that the new venture should be subsidized. Technically they had no power as directors to carry out the scheme they desired, but they were advised they could, and acting upon that advice, they altered the articles and invested the funds of their company in the new venture, with the full sanction and approval of their shareholders. Apart from the war, the new Clarmac Company might have proved a successful venture, and the summons might never have been heard of. In the events which have happened the Clarmac Company came to grief, and this investment has been lost. The question now is whether Allback can be made

(1) [1914] 1 Ch. 1, 11, 21.

(2) [1914] 1 Ch. 12, 20.

(3) [1905] A. C. 373.

ASTBURY
J.
1921
CLARIDGE'S
PATENT
ASPHALTE
COMPANY,
In re.

responsible for what, at the outside, was an error of judgment in taking part in this ultra vires transaction. [His Lordship then read s. 215, sub-s. 1, and s. 279, and continued:] That Allback, in conjunction with his then co-directors, committed a breach of trust, is not contested; but he contends, on the facts that I have referred to, that he acted honestly and reasonably, and ought fairly to be excused under s. 279. The liquidator, on the other hand, contends that s. 279 does not apply to acts ultra vires the company. But a misapplication of funds by a director ultra vires the company is clearly a breach of trust: *In re Sharpe*. (1)

The liquidator contends in the alternative that, however honest and reasonable Allback's conduct may have been, he ought not in the circumstances fairly to be excused. For this contention he relies on *National Trustees Co. of Australasia v. General Finance Co. of Australasia*. (2) In that case a trustee company, acting as trustees of a will, paid a portion of the assets to a person who was not entitled. The Colonial Courts and the Privy Council held that though the trustees had acted honestly and reasonably, they could not in the circumstances be excused. The facts of that case are really very different indeed from the present, and the reasons explained by the Privy Council for refusing relief are wholly inapplicable.

In my opinion s. 279 clearly applies to a case of ultra vires. All applications of a company's money ultra vires the company are in fact breaches of trust on the part of the directors. The language of s. 279 is perfectly wide and general, and I see no reason for limiting the wide generality of that section to breaches of trust where no question of ultra vires comes in.

In *In re Allsop* (3), after referring to s. 3 of the Judicial Trustees Act, 1896, the language of which is similar to s. 279, Cozens-Hardy M.R. said: "I can see no ground for narrowing or limiting the application of the wide words of the section. 'Any breach of trust' are emphatic words. The statute was obviously designed to protect honest trustees, and it ought not

(1) [1892] 1 Ch. 154, 167.

(2) [1905] A. C. 373, 374, 381.

(3) [1914] 1 Ch. 1, 11, 12.

to be construed in a narrow sense. I shrink from holding that, where trustees have divided an estate between A. and B. after taking competent advice that A. and B. are alone entitled, they cannot plead this section in answer to a subsequent claim by C. So to hold would be to render the relief given by the section almost nugatory." And on the next page the learned Judge said that the *Australasia Case* (1) was an authority that the Court had jurisdiction to relieve when payment had been made to a wrong person, although in that particular case the Court declined to exercise its jurisdiction.

ASTBURY
J.
1921
CLARIDGE'S
PATENT
ASPHALTE
COMPANY,
In re.

This transaction, if one can differentiate one breach of trust from another, was as little harmful or improper as one can very well imagine. The then directors did their utmost for the benefit of their cestui que trust company; they took the best advice; they acted in the way complained of openly for no benefit to themselves, but for the benefit of their cestui que trust; if it were not for a mere technicality, no objection could be taken to the transaction at all; and, indeed, apart from the effect of the war, no such objection would probably have been thought of.

I think, therefore, that I ought to relieve Allback under s. 279 and there will be no order therefore under para. 1 of the summons.

[After dealing with other claims which failed on the evidence his Lordship dismissed the summons with costs, but intimated that as there were many circumstances requiring investigation the liquidator had only done his duty in bringing the matters before the Court, and that no difficulty should be placed in the way of his recouping himself out of the assets.]

Solicitors: *Howard Rumney; Langford & Redfern.*

(1) [1905] A. C. 373.

G. R. A.

ASTBURY
J.

HOLDEN v. SOUTHWARK CORPORATION.

[1921. H. 855.]

1921
Mar. 11.
—

Local Government—Metropolitan Borough—Councillor—Disqualification—Rate-compounding Agreement—Poor Rate Assessment and Collection Act, 1869 (32 & 33 Vict. c. 41), s. 3—Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 46, sub-s. 1 (e).

Sect. 46, sub-s. 1 (e), of the Local Government Act, 1894, disqualifies a person from membership of a district council “if he is concerned in any bargain or contract entered into with the council . . . or participates in the profit of any such bargain or contract” :—

Held, that the section did not apply to rate-compounding agreements entered into with the council under the Poor Rate Assessment and Collection Act, 1869, s. 3.

Nutton v. Wilson (1889) 22 Q. B. D. 744 applied.

MOTION.

The plaintiffs were three councillors of the Metropolitan Borough of Southwark, hereinafter called the corporation. The defendants were the corporation and their town clerk.

Holden was first elected on January 26, 1915, and re-elected for three years on November 21, 1919. Rider was first elected on April 14, 1905, and re-elected for three years on November 21, 1919. Wilmot was first elected on July 22, 1920.

In April, 1921, it suddenly dawned on the defendants that as the plaintiffs had entered into rate-compounding agreements under the Poor Rate Assessment and Collection Act, 1869, s. 3, they were probably disqualified from being councillors by the Local Government Act, 1894, s. 46. (1)

(1) The Poor Rate Assessment and Collection Act, 1869, provides as follows :—

Sect. 3: “In case the rateable value of any hereditament does not exceed 20l. . . . in the metropolis and the owner is willing to enter into an agreement in writing with the overseers to become liable to them for the poor rates assessed in respect of such hereditament and to pay the poor rates whether

the hereditament is occupied or not, the overseers may agree with the owner to receive the rates from him, and to allow him a commission not exceeding 25 per cent. on the amount thereof.”

Sect. 4 authorizes the vestry to order the owners of such hereditaments to be rated instead of the occupiers in which case an abatement of 15 per cent. is allowed with a further abatement not exceeding

The agreements were in each case made before the plaintiffs became councillors. ASTBURY
J.

Holden's agreement was dated June 6, 1901, and renewed on January 27, 1902, as from April 1, 1902. As owner of

1921
HOLDEN
v.
SOUTHWARK
CORPORATION.

15 per cent. if the owner elects to be rated for unoccupied hereditaments.

The Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), Part IV., provides:—

Sect. 87, sub-s. 1: "A municipal election may be questioned by an election petition on the ground—(c) that the person whose election is questioned was at the time of the election disqualified;

Sub-s. 2: "A municipal election shall not be questioned on any of those grounds except by an election petition."

Sect. 88: "An election petition . . . shall be presented within 21 days after the day on which the election was held" except in the case of corrupt practices.

The Local Government Act, 1894, provides:—

By s. 31, sub-s. 1, the provisions of this Act with respect to the qualification (*inter alia*) of urban district councillors shall apply as if members of the vestries elected under the Metropolis Management Acts were urban district councillors.

Sect. 46, sub-s. 1: "A person shall be disqualified for being elected or being a member . . . of a council . . . of a district other than a borough [*vide infra*] . . . if he—(e) is concerned in any bargain or contract entered into with the council . . . or participates in the profit of any such bargain or contract or of any work done under the authority of the council. . . ."

Sub-s. 7: "Where a member of a council . . . becomes disqualified from holding office . . . the council . . . shall forthwith declare the

office to be vacant, and signify the same by notice . . . and the office shall thereupon become vacant."

Sub-s. 8: "If any person acts when disqualified . . . he shall for each offence be liable on summary conviction to a fine not exceeding 20*l*."

Sub-s. 9: "This section shall apply in the case of any authority whose members are elected in accordance with this Act in like manner as if that authority were a district council. . . ."

Sect. 48, sub-s. 3, incorporates Part IV. of the Municipal Corporations Act, 1882.

The London Government Act, 1899 (62 & 63 Vict. c. 14), provides:—

Sect. 1 establishes metropolitan boroughs.

Sect. 2, sub-s. 5, provides that the law relating to the constitution of administrative vestries and the members thereof shall apply in the case of borough councils under this Act and the councillors thereof, and the disqualifications of s. 46 of the 1894 Act shall apply to the offices of mayor and alderman.

Sect. 10, sub-s. 2, provides that the general rate and the poor rate shall be assessed by the borough council as one rate, termed the general rate.

Sect. 11, sub-s. 1, provides that the council of each borough shall be the overseers of every parish within their borough.

Sect. 31, sub-s. 1, provides that the word borough in previous Acts shall not include a metropolitan borough.

ASTBURY
J.
1921
HOLDEN
v.
SOUTHWARK
CORPORATION.
—

certain hereditaments he agreed with the corporation as overseers to pay the general rates on those hereditaments whether occupied or not, in consideration whereof the corporation agreed to allow him a commission of $12\frac{1}{2}$ afterwards increased to 15 per cent. The agreement was for one year certain and so from year to year, but determinable by either party on six months' notice expiring at Lady Day or Michaelmas Day.

A similar agreement by Rider was made on June 6, 1901, and renewed on January 29, 1902. A similar agreement by Wilmot was made on August 12, 1914, determinable on March 31 or September 30. The commission was in practice allowed as a deduction from the amount payable.

At a special meeting of February 17, 1921, the corporation, purporting to act under the Local Government Act, 1894, s. 46, sub-s. 7, resolved that the plaintiffs were disqualified and declared their offices vacant. Including the mayor, who presided, and the three plaintiffs there were sixty-six members present; but as the mayor, who had convened the meeting, refused to allow the plaintiffs to vote, the resolutions were carried by a majority of 32 to 30 against Holden, 31 to 30 against Rider, and 31 to 28 against Wilmot.

On February 25, 1921, the plaintiffs commenced this action for a declaration that the resolutions were invalid and for injunctions restraining the defendants from electing new councillors, or preventing the plaintiffs acting as councillors. A notice of motion for the injunctions was served with the writ, and the motion was treated as the trial.

Micklem K.C. and *Willoughby Williams* for the plaintiffs. Sect. 46 of the Local Government Act, 1894, applies to metropolitan boroughs. This appears from s. 46, sub-s. 9, read in connection with s. 31, sub-s. 1, and with the London Government Act, 1899, s. 2, sub-s. 5.

The questions therefore are :—

- (a) whether the rate-compounding agreements are bargains or contracts within s. 46, sub-s. 1 (e) ;

(b) if so, whether the procedure under sub-s. 7 was applicable ;

(c) if applicable, whether it was not vitiated by the refusal of the plaintiffs' votes.

As to (a). These agreements were made with the corporation as overseers. In other words they were virtually made with the overseers so that s. 46, sub-s. 1 (e), is *prima facie* inapplicable.

Apart from that s. 46, sub-s. 1 (e), cannot apply to all contracts even if made with the corporation as such. Otherwise a person taking a season ticket on a municipal tramway or a supply of municipal electric light would be disqualified. The sub-section must clearly be limited to such contracts for profit as conceivably might give rise to a conflict between interest and duty : *Nutton v. Wilson* (1) decided on similar provisions of the Public Health Act, 1875 (38 & 39 Vict. c. 55), Sch. 2, rr. 64, 70.

Now these statutory agreements are expressly sanctioned by the Poor Rate Assessment and Collection Act, 1869, s. 3, and if the owners do not enter into them the corporation might proceed under s. 4. They are merely for the mutual convenience of the owners and the corporation, and there is no question of money profit on either side. How can they possibly give rise to a conflict between interest and duty ? There are 1100 compounding owners in Southwark. Are they all disqualified ?

As to (b). The plaintiffs' disqualification, if any, existed before they became councillors. They have not " become " disqualified within sub-s. 7. The procedure under sub-s. 7 was therefore misconceived. The corporation could have questioned the election within twenty-one days under the Municipal Corporations Act, 1882, ss. 87, 88, but can now only proceed by *quo warranto* : *Rex v. Beer*. (2)

As to (c). Even if sub-s. 7 had applied the plaintiffs were *de facto* councillors, and the rejection of their votes would have nullified the resolutions.

Luxmoore K.C. and *Roland Burrows* for the defendants.

(1) 22 Q. B. D. 744, 748.

(2) [1903] 2 K. B. 693.

ASTBURY J. There is really only one point—namely (a). If the plaintiffs succeed on that they get their relief as a matter of course. If they fail, they are disqualified and have no locus standi to complain of the procedure of a corporation of which they are not qualified to be members.

1921
HOLDEN
v.
SOUTHWARK
CORPORATION.
—

As to (a). If all the plaintiffs' houses were well let, these agreements would clearly be profitable to them, and it would be to their personal interest to vote against their determination, though as councillors they might well think 15 per cent. a high commission for collecting rates from responsible tenants. If the whole council were rate-compounding owners, the agreements would probably be continued in such a case, and the commission lost to the ratepayers.

A commission for collecting rents is a clear disqualification: *Rex v. Rowlands*. (1) A commission for collecting rates must be in the same position. The mere fact that the collector receives a high commission for guaranteeing an effectual collection only goes to quantum. It does not remove the disqualification. The agreements are really within the spirit of the sub-section, but even if they were not, they are so clearly within its wide language that the latter must prevail. (2)

As to (b). We admit that the procedure under sub-s. 7 was a nullity. But, if disqualified, the plaintiffs have no locus standi to question it. They cannot have an injunction, which is only granted in support of a right to which ex hypothesi they are not entitled: *Aslatt v. Southampton Corporation* (3); *Richardson v. Methley School Board* (4); *Kershaw v. Shoreditch Corporation* (5); and they cannot have a declaration in the air to the effect that a corporation to which they do not belong has mistaken its procedure.

As to (c). The plaintiffs, if disqualified, had clearly no right to vote, even if the proceedings had been otherwise regular.

ASTBURY J. [after stating the facts]. Under these rate-compounding agreements as sanctioned by the Poor Rate

(1) [1906] 2 K. B. 292.

(3) (1880) 16 Ch. D. 143, 147.

(2) Compare *Rex v. Roscommon JJ.*

(4) [1893] 3 Ch. 510.

[1906] 2 I. R. 173, 179.

(5) (1906) 22 Times L. R. 302.

Assessment and Collection Act, 1869, s. 3, the owner of property agrees himself to pay the rates levied in respect of his property whether occupied or not subject to deduction of commission, and the overseers are saved the expense of ascertaining whether the property is or is not occupied and from collecting the rates from the various tenants. In other words this is a statutory method of paying and collecting rates, applicable to all owners of property in the rateable area who fall within the limits of the section.

ASTBURY
J.
1921
HOLDEN
v.
SOUTHWARK
CORPORATION.
—

Three questions have been raised in this case: First, whether these rating agreements are bargains or contracts within s. 46, sub-s. 1 (e); secondly, whether the corporation's proceedings were justified by sub-s. 7; and, thirdly, whether the resolutions even if otherwise effectual were validly passed, as the mayor, with a prophetic instinct perhaps of his want of a majority otherwise, excluded the votes of the three plaintiffs in respect of each resolution.

On the first point it seems to me that these rate-compounding agreements are not within the mischief contemplated by s. 46, sub-s. 1 (e), at all. They are agreements entered into not with the corporation as such, but with the overseers. If there had been separate overseers in Southwark, as in many parts of the country, the point would not have been arguable. The corporation however being by statute appointed overseers for their district the question is whether these agreements were contracts within the meaning of the sub-section in question. In my opinion they were not. In the first place, as I have said, they were virtually agreements with the overseers as such and not with the corporation within the meaning of the section. Secondly, even if they are regarded as contracts entered into with the corporation as such they are not within the ambit of this section having regard to its subject matter and the object with which it was passed.

This is a penal section disqualifying certain people from being elected to or acting upon councils, and the only apparent reason for its being passed is that it is undesirable that people should exercise these offices where their interest and duty

ASTBURY
J.
1921
HOLDEN
v.
SOUTHWARK
CORPORATION.

may conflict. The section provides that if a person is concerned in any bargain or contract entered into with the council or participates in the profit of any such bargain or contract or of any work done under the authority of the council, he shall suffer the disqualification. It is impossible to say that because the plaintiffs have entered into an arrangement open to ratepayers generally which is provided for by statute and under which the rates of the houses owned by them are agreed to be paid for the convenience of the corporation just as much as for their own they have entered into a bargain or contract within the object or meaning of this section at all. They have not by so doing placed themselves in any exceptional relationship to the council, separating them from other ratepayers to whom the rate-compounding section applies, and it cannot have been intended to disqualify people generally because they agree to pay their rates in a manner provided for by statute.

There is further no evidence that any of the plaintiffs have participated in any profit at all from the agreements entered into by them. I do not know what arrangement these plaintiffs may have made with their tenants, and, if no such agreements as those in question had been entered into, the occupiers would have been liable to pay the rates, and there is otherwise no liability to pay them while the premises are vacant.

In *Nutton v. Wilson* (1), referring to similar provisions of the Public Health Act, 1875, Sch. 2, rr. 64, 70, Lord Esher said: "They are intended to prevent the members of local boards, which may have occasion to enter into contracts, from being exposed to temptation, or even to the semblance of temptation." And Lindley L.J. said: "To interpret words of this kind, which have no very definite meaning, and which perhaps were purposely employed for that very reason, we must look at the object to be attained. The object obviously was to prevent the conflict between interest and duty that might otherwise inevitably arise."

How a councillor's interest and duty can possibly conflict because he arranges with the overseers to pay his rates in a particular way I am unable to understand. Further, it is quite obvious that some limitation must be put upon the general words of this sub-section. It is absolutely ridiculous to imagine that every person who has entered into any kind of contract with a corporation is subject to this disqualification. Suppose a corporation runs its own tramways. If no limitation is put upon the section, every one who takes a daily, weekly or monthly ticket to ride in a tramcar belonging to the corporation would be penalised. Again, suppose a corporation undertakes the electric light installation in its district. Every person who accepted the general invitation to take current would be ineligible to serve on the council. Many other similar instances of general as distinct from particular contracts can readily be thought of.

This sub-section must therefore be construed as referring to particular and exceptional bargains or contracts entered into for profit between the person in question and the corporation where the interest and duty of the person entering into the contract might conflict if he were elected a member of the body with whom he contracted. In my judgment the present contracts do not come within the subject matter of this section at all, and I so hold.

The second point is in regard to the validity of the procedure under s. 46, sub-s. 7. It is not even suggested that it was justified by that sub-section. [His Lordship read s. 46, sub-s. 7.] None of the three plaintiffs have as members of this council "become" disqualified in this way at all, as all the contracts in question were entered into before their election. If the corporation had desired to question the "validity of the election" of the three plaintiffs or any of them they could have done so on petition under ss. 87, 88 of the Municipal Corporations Act, 1882, provided that the petition had been presented within twenty-one days after the election. If on the other hand they had desired to obtain a decision whether the plaintiffs, or any of them, were disqualified from "being members" their proper proceeding

ASTBURY
J.
1921
HOLDEN
v.
SOUTHWARK
CORPORATION.
—

ASTBURY J. would have been by quo warranto. The law on this question is discussed in *Rex v. Beer*. (1)

1921
HOLDEN v. SOUTHWARK CORPORATION.
The third point, which is of little interest if I am right on either of the other two, is as to the validity of the resolutions, having regard to the fact that the mayor ruled that none of the three plaintiffs were entitled to vote. They were at this time de facto councillors of the borough, and as far as I can see the mayor had no right whatever to exclude their votes from being counted. If they had been counted the resolution with regard to Holden and Rider would have been lost; and the resolution with regard to Wilmot might well have suffered a similar fate. I am of opinion, therefore, for what it is worth, that the resolutions were invalid on this ground also.

There must therefore be a declaration as asked for, and an injunction to restrain the corporation from proceeding with the election of councillors in the room of the plaintiffs and from excluding them from acting in their office.

Solicitors : *Church, Rackham & Co.* ; *G. C. Topham*.

(1) [1903] 2 K. B. 693.

G. R. A.

In re BEBINGTON'S TENANCY.

PETERSON
J.

BEBINGTON *v.* WILDMAN.

1921

Jan. 27, 28.

[1920. W. 3648.]

Landlord and Tenant—Notice to quit—Sale of Reversion in Two Lots—Notices by Purchasers on different Days—Validity of Notices.

When a landlord has sold in two lots property that is let on a single tenancy and the tenant has not recognized the division of the tenancy, a notice to quit given by the purchaser of one lot is invalid *ab initio* and cannot be cured by a subsequent notice to quit given by the purchaser of the other lot, even when the second notice is given before the date from which a notice determining the entire tenancy must run in order to be effective.

ADJOURNED SUMMONS.

By an agreement dated August 4, 1904, the farm and lands called Daisy Bank Farm in the parish of Sproston were let to the plaintiff John William Bebington at the annual rent of 170*l.* By the terms of the agreement the tenancy was to commence as to the lands from February 2, 1905, and as to the house and buildings from May 1, 1905, and was terminable by twelve calendar months' notice on either side, the notice to terminate as to the lands on February 2 and as to the house and buildings on May 1 in any year. The premises originally consisted of nearly eighty-two acres, but later some eight acres were added to the farm on the terms of the agreement and one acre given up for a keeper's cottage, with the result that the premises held under the agreement were increased to 89 a. 2 r. 18 p.

On November 18, 1919, the whole farm was put up for auction by the landlord, part being comprised in Lot 1 and part in Lot 7. At the auction Lot 1 consisting of about nineteen acres was purchased by George Henry Wright and Lot 7 which comprised the remainder of the farm was purchased by the defendant, William Wildman. Lot 7 was conveyed to the defendant by deed dated January 9, 1920, and Lot 1 to G. H. Wright by deed dated January 12, 1920. The rent was apportioned by agreement between the

PETERSON purchasers, but the plaintiff did nothing to recognize the
J. division of the tenancy.

1921

BEBINGTON'S
TENANCY,

In re.

BEBINGTON

v.

WILDMAN.

On January 22, 1920, the defendant's solicitors gave the plaintiff the following notice: "We the undersigned as solicitors for or on behalf of William Wildman . . . hereby give you notice to quit and deliver up possession of the land and premises at Sproston known as Daisy Bank Farm in respect of which you are now his tenant, as to the land on the 2nd February, 1921, and as to the house and buildings and outlet field on the 1st day of May, 1921, or at the end of the year of your tenancy which will expire next after the end of one year from the date of the service of this notice."

Nine days later, on January 31, 1920, G. H. Wright's solicitors gave the plaintiff a notice in these terms: "As solicitors for and on behalf of George Henry Wright . . . we hereby give you notice to quit and deliver up possession of all those several fields or closes of land situate in the township of Sproston in the County of Chester containing in area 19 acres 1 rood 2 perches or thereabouts (being the detached portion of Daisy Bank Farm) on the 2nd day of February, 1921, or other the day on which the current year of your tenancy shall expire next after the end of one year from the service of this notice. . . ."

By two letters both dated March 2, 1920, and addressed to the defendant and G. H. Wright respectively, the plaintiff objected that neither of the two notices was a good notice to quit as it did not comprise the whole of the land in his tenancy.

By agreement between the parties the question was submitted to the Court, on an originating summons taken out in the Liverpool District Registry, whether the notice to quit dated January 22, 1920, served on the plaintiff by the defendant in respect of part of Daisy Bank Farm was not an effective notice to quit, although the notice to quit the rest of Daisy Bank Farm was only given to the plaintiff by G. H. Wright on January 31, 1920.

Cunliffe K.C. and *Ackroyd* for the plaintiff. A notice to quit part only of a tenancy is invalid, when the tenant

has not recognized the division of the tenancy: Wood-
fall on Landlord and Tenant, 19th ed., p. 413; Foà on
Landlord and Tenant, 5th ed., p. 600; Redman on Land-
lord and Tenant, 7th ed., p. 616; *Right v. Cuthell* (1);
Doe v. Archer (2); *Doe v. Church* (3); *Prince v. Evans*. (4)
Further the original bad notice of the defendant cannot
be taken in conjunction with the subsequent notice
relating to the rest of the tenancy and treated as a
notice to quit the entire property. Two bad notices
cannot together make a good notice. A notice to be
valid must be such as the tenant could act upon with
security from the moment that he received it: *Right v.*
Cuthell. (1) Here the tenant would never be able to act
with certainty right up to the date of surrender of the
tenancy, for a bad notice to quit does not bind its giver:
Redman on Landlord and Tenant, 7th ed., p. 563; Foà on
Landlord and Tenant, 5th ed., p. 609; Woodfall on Landlord
and Tenant, 19th ed., p. 397; *Doe v. Johnston* (5); *John-*
stone v. Hudlestone (6); *Doe v. Mihward* (7); see also
Mollett v. Brayne. (8)

Hughes K.C. and *Dighton Pollock* for the defendant. The
only real question here is whether there was not before
February 2, 1920, the material date, an effective notice deter-
mining the whole of the tenancy. There is no doubt that
the defendant and Wright could have determined the
tenancy by giving notices to quit at the same time; is the
position altered because the notices were given on different
days before in each case the date from which the notices
had to begin to run? It is submitted not. All that a tenant
is entitled to is an effective notice before the beginning of
the period for which the notice has to run.

[PETERSON J. It must be a notice that cannot be
withdrawn.]

Only after the date from which the notice has to run.

(1) (1804) 5 East, 491, 497, 499.

(2) (1811) 14 East, 245.

(3) (1811) 3 Camp. 71.

(4) (1874) 29 L. T. 835.

(5) (1825) 1 M'Clel. & Y. 141.

(6) (1825) 4 B. & C. 922.

(7) (1838) 3 M. & W. 328.

(8) (1809) 2 Camp. 103.

PETERSON J. 1921
 BEBINGTON'S
 TENANCY,
In re.
 BEBINGTON
v.
 WILDMAN.
 —

It is conceded that from January 21 to 31 the defendant's notice was ineffective, but from the latter date there was a proper notice. It is not necessary that the tenant should be able to act with security from the date when the notice was received. His right and his only right is to receive a proper notice of the length bargained for. If a longer notice be given, which is invalid, it can be corrected at any time before the notice begins to run: *Woodfall on Landlord and Tenant*, 19th ed., p. 407; *Doe v. Goldwin* (1); *Goodtitle v. Woodward*. (2) Thus in the latter case it was held that a notice given by an agent without authority could be ratified on a date before the notice had to begin to run. *Right v. Cuthell* (3) is distinguishable, as there was in that case an absolute provision for the notice being signed by all the persons entitled to give it. Further, the ratification there was only made after the notice had necessarily begun to run. This question of subsequent ratification is also dealt with in *Doe v. Walters* (4); see per Chitty J. in *Dibbins v. Dibbins* (5), and *Doe v. Archer* (6), and *Doe v. Smith*. (7)

Again there is no authority for the view that the person giving a notice can afterwards say it is invalid. It is submitted that *Johnstone v. Hudlestone* (8) is no authority for this contention. The person giving the notice must be estopped from withdrawing it after the tenant has acted upon it. It follows that as soon as the tenant had both the notices here, he could safely act upon them and that they therefore operated to determine the tenancy.

Cunliffe K.C. in reply.

PETERSON J. [after stating the facts]. The question is whether the defendant's notice to quit, taken in conjunction with Wright's subsequent notice to quit, operated as a valid notice.

There is no doubt that the defendant's notice taken by itself was not a good notice to terminate the tenancy. It

(1) (1841) 2 Q. B. 143.

(2) (1820) 3 B. & Al. 689.

(3) 5 East, 491

(4) (1830) 10 B. & C. 626.

(5) [1896] 2 Ch. 348, 352.

(6) 14 East, 245.

(7) (1836) 5 Ad. & E. 350.

(8) 4 B. & C. 922.

was a notice to deliver up part of a tenancy and not the whole, and it is well established that such a notice is invalid. If authority be needed for this proposition *Prince v. Evans* (1) is sufficient. In that case the assignee of part of a reversion gave notice to the tenant to quit that part of his tenancy. The tenant had in no way recognized the assignee as his landlord and the notice was held to be bad. I start therefore with the proposition that the defendant's notice to quit was in itself bad.

PETERSON
J.
1921
BEBINGTON'S
TENANCY,
In re.
BEBINGTON
v.
WILDMAN.

A notice of this description is, as has been pointed out in at least one case, an act in defeasance of the estate of the tenant, and it has been laid down that in order to be valid a notice to quit must be one on which the tenant can act with security from the very moment at which he receives it. In *Right v. Cuthell* (2) this is laid down by Lord Ellenborough who, after pointing out that the notice was to defeat an estate, proceeded: "The person therefore to whom it is given ought to be assured at the time he receives it, and when he is to act upon it, that if he deliver up possession at the end of the six months, he will be acquitted of all further claims in respect of the remainder of the term." Then he goes on to deal with the question of ratification and says: "A ratification given afterwards will not do in this case; because the tenant was entitled to such a notice as he could act upon with certainty at the time it was given." So, too, Lawrence J. says (3): "I think there is great weight in the argument of the defendant's counsel, that for the notice to be good it ought to be binding on all the parties concerned at the time when it was given, and not to depend for its validity, in part, upon any subsequent recognition of one of them: because the tenant is to act upon the notice at the time, and therefore it should be such as he may act upon with security." So, too, Le Blanc J. says (3): "The tenant is to act upon this notice at the time, and he must be satisfied that it is such a notice as will bind all the three," that is, the three executors entitled in that case to give the notice. A similar proposition is laid

(1) 29 L. T. 835.

(2) 5 East, 491, 497.

(3) 5 East, 499, 500.

PETERSON down in *Doe v. Walters*. (1) Parke J., after stating that he was not satisfied with the reasons given for the decision in *Goodtitle v. Woodward* (2), went on to discuss *Right v. Cuthell*. (3) He says (1): "In *Right v. Cuthell* (3) it was held by Lord Ellenborough C.J. and Lawrence J. that the ratification by a joint tenant of a notice to quit given by his companion would not make it good, on the ground that the notice must be such an one on which the tenant can rely and act with certainty at the moment of receiving it. Now if Grylls had not authority to give the notice at the time when it began to operate as a notice, it seems to me that it was insufficient, and that the lessor of the plaintiff would not be entitled to recover." In my view Parke J., when using the expression "at the time when it began to operate as a notice," was not differing from what Lord Ellenborough and Lawrence J. said—namely, that "the notice must be such an one on which the tenant can rely and act with certainty at the moment of receiving it." A notice to quit does in fact operate from its receipt and no distinction can properly be drawn between the observations of Parke J. and those of Lord Ellenborough and Lawrence J. The result is that the present case must be approached from the point of view that for a notice to quit to be valid the tenant must be able to rely on it from the moment of receiving it. If he cannot, the notice is invalid altogether as is pointed out in *Doe v. Archer*. (4) In that case a notice to quit part of the premises was given and it was held to be bad, inasmuch as it was not a notice to give up the whole. Lord Ellenborough puts it in this way (4): "The landlord must have intended to give such a notice to quit as the lease reserved to him the liberty of giving, and not a void notice to quit a part only." It appears to me therefore that if a notice to quit is not such an one as may properly be given, the notice is void ab initio. But it is said that the notice given by Wright, the other purchaser, which related to the remainder of the land included in the tenancy, operated in conjunction with the bad notice

(1) 10 B. & C. 626, 634.

(2) 3 B. & Al. 689.

(3) 5 East, 491, 497.

(4) 14 East, 245, 248.

previously given by the defendant as a valid notice to quit the whole of the property comprised in the tenancy. It may be that when first one and then the other of two joint tenants gives a notice to quit, the two notices can be taken together, provided that the latter of the two notices be given before the latest date on which a complete notice was required to be given in order to be effective. That would depend on the circumstances and the actual contents of the notices. Here, however, I have a notice given by a purchaser of part of the property comprised in the tenancy in respect only of the land purchased by him, and that notice is, as I have said, bad and void; and then I have a notice given at a later date by the purchaser of the rest of the property in respect only of that part of the property, so that this second notice is bad also. It is difficult to see how these notices can together constitute a valid notice.

PETERSON
J.
1921
BEBINGTON'S
TENANCY,
In re.
BEBINGTON
v.
WILDMAN.

Assuming that regard can be had to the second notice, the question arises whether the tenant could when he received the first notice have acted upon it. It has been argued that the defendant after giving a bad notice could not have said that it was invalid at any time thereafter and accordingly that the tenant when he received the second notice was able to act with security on the two notices. If the opinion expressed by the Court on various occasions is correct—namely, that in order to be valid a notice to quit must be good when received, it follows that the notice by the defendant was bad when received by the plaintiff; and it seems to me to be established further by the authorities to which I have been referred—*Doe v. Johnston* (1), *Johnstone v. Hudleston* (2), and *Doe v. Milward* (3)—that a man who gives a bad notice, that is, a notice which does not operate as a defeasance of the estate of the tenant, is not afterwards precluded or estopped from saying it is void. In one of the cases I have just referred to a bad notice was given by the tenant, and the Court acted on the view that although the tenant had given the notice he was free to say that it was

(1) 1 M'Clel. & Y. 141.

(2) 4 B. & C. 922.

(3) 3 M. & W. 328.

PETERSON invalid. Therefore the position is that the defendant gave a bad notice and that the tenant was not at any time in a position to act with certainty on the notice, inasmuch as it was always open to the defendant to say that the notice he had given was bad and inoperative. The result is that the defendant's notice, taken by itself or in conjunction with the notice of the purchaser of the other part of the tenancy, is bad. The plaintiff is entitled to succeed on the present application and to have it declared that the notice to quit dated January 22, 1920, served on the plaintiff by the defendant is not an effective notice, although notice to quit the rest of Daisy Bank Farm was given to the plaintiff by the other purchaser, Wright, on January 31, 1920.

Solicitors : *W. C. Broadbridge, for G. H. Hindley, Liverpool ; Gibson & Weldon, for H. P. & R. S. Rigby, Middlewich.*

H. C. G.

P. O.
LAWRENCE
J.

In re HUSSEY AND GREEN'S CONTRACT.

[1920. H. 3820.]

1921
BEBINGTON'S
TENANCY,
In re.
BEBINGTON
v.
WILDMAN.

In re HUSSEY.

HUSSEY *v.* SIMPER.

[1919. H. 1048.]

Vendor and Purchaser — Title — Will—Devise — “Heir-at-law” — “Absolutely” — Word of Limitation or Purchase—Rule in Shelley’s Case.

The word “absolutely” superadded to the word “heir-at-law” in a devise of real estate is a word defining the estate which the heir is to take and has the same effect as if technical words of limitation had been used, making the heir a newstock of descent as a designated taker by purchase.

Where therefore a testator devised real estate in trust for W. for his life, and afterwards in trust “for his heir-at-law absolutely” :—

Held, that the devise did not fall within the rule in *Shelley’s Case* (1581) 1 Rep. 93*b*, but within the exception to that rule established in *Archer’s Case* (1597) 1 Rep. 66*b* ; and therefore that W. took only an equitable estate for life, and his heir-at-law took by purchase an equitable estate in fee simple.

ADJOURNED SUMMONS.

W. Hussey by his will dated February 2, 1912, after appointing his son William Hussey and his son-in-law A. Simper his executors and trustees and after making a certain specific devise, devised and bequeathed the residue of his real and personal estate to his trustees upon trust for his wife for her life, and after her death upon trust for sale and conversion as therein mentioned, except that his trustees should hold his house No. 1 Rockville, Trowbridge, in trust for his son William "during his life and afterwards for his heir-at-law absolutely," and should hold his house No. 2 Rockville, Trowbridge, in trust for his son Herbert "during his life and afterwards for his heir-at-law absolutely," and should hold his house Clyde Villa, Trowbridge, in trust for his son Sidney "during his life and afterwards for his heir-at-law absolutely." With these three exceptions the trustees were to stand possessed of his residuary estate in trust for all his children as therein mentioned.

The testator died on February 2, 1912. His wife died in October, 1913.

On October 21, 1920, William Hussey as owner in fee simple contracted to sell his house No. 1 Rockville to E. Green for 950*l*. On investigation of the title it was objected that the vendor had only a life estate, and eventually the purchaser issued a summons under the Vendor and Purchaser Act, 1874, for a declaration that the vendor had not shown a good title to the property.

E. Green was a willing purchaser, and on his summons coming on for hearing it was arranged, having regard to the case of *In re Nichols' and Von Joel's Contract* (1), that a construction summons entitled "*In re Hussey. Hussey v. Simper* [1919. H. 1048]" which had been issued by William and Herbert Hussey against Simper to obtain the opinion of the Court on the above devises and had remained in abeyance, should be heard at the same time, and that counsel for the purchaser should also appear for A. Simper, the independent

P. O.
LAWRENCE
J.

1921
HUSSEY
AND
GREEN'S
CONTRACT,
In re.
HUSSEY,
In re.
HUSSEY
v.
SIMPER.

(1) [1910] 1 Ch. 43.

P. O.
LAWRENCE
J.

trustee of the testator's will, as representing the interest of the heir-at-law of William Hussey, the son.

1921

HUSSEY
AND
GREEN'S
CONTRACT,
In re.
HUSSEY,
In re.
HUSSEY
v.
SIMPSON.

Gavin T. Simonds for the purchaser. The decision in *In re Nichols' and Von Joel's Contract* (1) does not estop the purchaser. He did not know of the construction summons and had to issue a vendor and purchaser summons. Having regard to the opinion of Lord Eldon quoted by Lord Macnaghten in *Van Grutten v. Foxwell* (2), which is as true now as it was then, this is not a title which under the circumstances ought to be forced on a purchaser. The question is whether the rule in *Shelley's Case* (3) applies. The rule is stated by Lord Macnaghten in *Van Grutten v. Foxwell* (4), and he points out that the question now in every case must be whether the expression requiring exposition, be it "heirs" or "heirs of the body," or any other expression which may have the like meaning, is used as the designation of a particular individual or a particular class of objects, or whether, on the other hand, it includes the whole line of succession capable of inheriting. It is true that the word "heir" or "heir-at-law" in the singular is not of itself sufficient to take a case out of the rule, but when the word is in the singular the rules of law are less stringent in uniting the limitation of the inheritance to the estate for life of the ancestor: Theobald on Wills, 7th ed., pp. 421-2. I rely on the word "heir-at-law" in the singular and on the superadded word "absolutely" as showing that the heir takes by way of purchase as a persona designata in fee simple. The word "absolutely" indicates the quality of the estate which the heir is to take as is equivalent to "heirs and assigns," and brings the case within *Archer's Case* (5); *In re Davison's Settlement* (6); *Greaves v. Simpson* (7); *Evans v. Evans*. (8) Everything here turns on the word "absolutely," and there is no case in the books where the word occurs in such a devise.

(1) [1910] 1 Ch. 43.

(5) 1 Rep. 665.

(2) [1897] A. C. 658, 671.

(6) [1913] 2 Ch. 498, 502-3.

(3) 1 Rep. 935.

(7) (1864) 33 L. J. (Ch.) 641; 10

(4) [1897] A. C. 658, 669, 676-7. Jur. N. S. 609.

(8) [1892] 2 Ch. 173.

W. G. Hart for William Hussey. The limitation in the present case confers a fee simple on William Hussey under the rule in *Shelley's Case*. (1) There is a long series of authorities extending from the time of Queen Elizabeth to the year 1916, which show that a gift to A. for life followed by a gift to his "heir" in the singular gives A the fee simple: *Clerk v. Day* (2); *King v. Melling* (3); *Dubber v. Trollope* (4); *Blackburn v. Stables* (5); *Silcocks v. Silcocks*. (6) The word "heir" is a nomen collectivum, and it is only where technical words of limitation are added to a gift to the heir that a case is taken out of the rule in *Shelley's Case*. (1) In order to bring this case within *Archer's Case* (7) you must have words of limitation added to the gift to the heir-at-law. The cases are collected in *Fearne on Contingent Remainders*, 9th ed., pp. 178-9. Here the word "absolutely" has no technical meaning and is equivalent to "for ever" and indicates an intention to pass the fee to William Hussey: *Van Grutten v. Foxwell* (8); *Fuller v. Chamier*. (9) "The cases of *Greaves v. Simpson* (10) and *Evans v. Evans* (11) are distinguishable. In each of them the limitations were to the heirs of the heir-at-law and were clearly within *Archer's Case* (7), and in *In re Davison's Settlement* (12) the limitations were in a deed, to which a different rule is applicable.

Gavin T. Simonds in reply.

Cur. adv. vult.

Feb. 14. P. O. LAWRENCE J. This case raises the question whether the rule in *Shelley's Case* (1) applies to the devise contained in the will of the testator of his freehold house, No. 1 Rockville, Trowbridge, Wilts. [His Lordship stated the facts and continued:] If the rule in *Shelley's Case* (1) applies to this devise the testator's son William takes an equitable estate in fee simple in the house, but if the rule

P. O.
LAWRENCE
J.

1921

HUSSEY
AND
GREEN'S
CONTRACT,
In re.

HUSSEY,
In re.

HUSSEY
v.
SIMPSON.

(1) 1 Rep. 93b.

(2) (1593) Cro. Eliz. 313.

(3) (1670) 1 Vent. 214.

(4) (1734) Amb. 453, 458, 460.

(5) (1814) 2 V. & B. 367.

(6) [1916] 2 Ch. 161.

(7) 1 Rep. 66b.

(8) [1897] A. C. 658, 684.

(9) (1866) L. R. 2 Eq. 682, 687.

(10) 33 L. J. (Ch.) 641.

(11) [1892] 2 Ch. 173.

(12) [1913] 2 Ch. 498.

P. O.
LAWRENCE
J.

1921

HUSSEY
AND
GREEN'S
CONTRACT,
In re.

HUSSEY,
In re.

HUSSEY
v.
SIMPER.

does not apply he takes only an equitable estate for life. The rule in *Shelley's Case* (1) is stated by Lord Macnaghten in his classic speech in *Van Grutten v. Foxwell* (2) and I need not repeat it here. From this speech I have culled the following propositions which in my opinion have to be borne in mind in considering the present case—namely, the rule in *Shelley's Case* (1) is a rule of law and is imperative; whenever the limitations are such as to call for its application it operates invariably and automatically; in order to see whether in any particular case the limitations are such as to call for its application the Court must construe the words of the instrument according to the established rules of construction; the only rule of construction governing this class of case is that technical words must receive their legal meaning unless the explanatory context demands that they should receive some other meanings. Now it has long been settled that the use of the word “heir” or “heir-at-law” in the singular does not of itself make it a word of purchase so as to prevent the rule in *Shelley's Case* (1) from being attracted. It is said however that it is easier to exclude the rule when the singular number is used: see per Younger J. in *Silcocks v. Silcocks*. (3) By this I think is meant that the word “heir” or “heir-at-law” in the singular number, not being the usual or technical method of expressing words of limitation, yields more readily to an explanatory context showing that it is used as *designatio personæ* and not as *nomen collectivum*, than would be the case if the plural number had been used. If in the present case I am judicially satisfied that the testator has used the word “heir-at-law” not as a word of limitation but to designate a particular person who is to take by purchase, I am at liberty to give effect to the expressed intention of the testator and to hold that the rule in *Shelley's Case* (1) does not apply. *Archer's Case* (4) as explained by subsequent cases (see *Fearne on Contingent Remainders*, 10th ed., vol. i., p. 180) has established that where words of limitation are superadded to the word “heir” or “heir male” in the

(1) 1 Rep. 93b.

(2) [1897] A. C. 658, 667.

(3) [1916] 2 Ch. 161, 166.

(4) 1 Rep. 66b.

singular number such words of limitation operate to make the word "heir" or "heir male" a word of purchase and to exclude the rule in *Shelley's Case*. (1) In the present case no technical words of limitation are added after the word "heir-at-law," but Mr. Gavin Simonds on behalf of the independent trustee (who represents the interests of the heir-at-law of the testator's son William) contends that, notwithstanding the absence of such technical words of limitation, sufficient explanatory context is to be found in the will to judicially satisfy the Court that the testator has used the word "heir-at-law" to designate the individual person who is to take the property as purchaser. He relies, first, upon the use of the singular number; secondly, upon the use of the word "heir-at-law," which he contends is less easily treated as a word of limitation than the word "heir"; and thirdly and mainly, upon the addition of the word "absolutely," and argues that these three matters taken in combination make it plain to the mind of the Court that in the present case the word "heir-at-law" is not used as nomen collectivum but as designatio personæ. In my judgment neither the use of the singular number nor the use of the word "heir-at-law" instead of "heir," if taken alone, are sufficient to exclude the rule in *Shelley's Case*. (1)

There remains the question as to the effect of the word "absolutely." In the first place, Mr. Hart contends that the case of *Fuller v. Chamier* (2)—a decision of Wood V.-C.—decides that the exception to the rule in *Shelley's Case* (1) established by *Archer's Case* (3) is strictly confined to cases in which the word "heir" or "heir male" in the singular number is followed by the word "heirs" or "heirs male" in the plural number, and that only in those cases in which technical words of limitation in the legal sense are superadded to the word "heir" or "heir male" can the Court properly hold that the rule in *Shelley's Case* (1) is excluded. In my opinion Wood V.-C. did not purport to lay down any such hard-and-fast rule. Moreover such a rule would be contrary to the law as stated

P. O.
LAWRENCE
J.

1921
HUSSEY
AND
GREEN'S
CONTRACT,
In re.
HUSSEY,
In re.
HUSSEY
v.
SIMPES.

(1) 1 Rep. 93b.

(2) L. R. 2 Eq. 682.

(3) 1 Rep. 66b.

P. O.
LAWRENCE
J.

1921

HUSSEY
AND
GREEN'S
CONTRACT,
In re.

HUSSEY,
In re.

HUSSEY
v.

SIMPER.

by Lord Macnaghten in *Van Grutten v. Foxwell* (1)—namely, that in ascertaining whether the limitations are such as to call for the application of the rule in *Shelley's Case* (2) the established rules of construction are to be applied. In my judgment it is no more necessary to use technical words of limitation in order to exclude the rule in *Shelley's Case* (2) than it is necessary to use technical words of limitation in order to bring the rule in *Shelley's Case* (2) into operation. That the application of the rule in *Shelley's Case* (2) does not depend upon the use of technical words is expressly stated by Lord Macnaghten in *Van Grutten v. Foxwell* (1), and by Younger J. in *Silcocks v. Silcocks*. (3) It follows therefore that the question whether the word "heir" has been used in any particular instrument as a word of limitation or as a word of purchase must depend upon the terms of that instrument, construed according to the ordinary rules of construction. In the next place, Mr. Hart contends that the word "absolutely" is no stronger and has no greater effect than the words "for ever," and that it is well settled that the addition of these latter words has not the effect of taking the case out of the rule in *Shelley's Case*. (2) In support of this proposition he cites the cases of *Dubber v. Trollope* (4), *Fuller v. Chamier* (5), and *Silcocks v. Silcocks*. (6) These cases undoubtedly show that the words "for ever" when superadded to the word "heir" or "heir male" do not have the effect of excluding the rule in *Shelley's Case* (2), and there are many other cases which might have been cited to the same effect, but in my judgment none of these cases afford any assistance in arriving at a conclusion as to the effect of the use of the word "absolutely." It is true as pointed out by Mr. Hart that both the expressions "for ever" and "absolutely" when used without any words of limitation in connection with a devise of real estate before the Wills Act operated to carry an estate in fee simple to the devisee whilst neither of them was sufficient to carry such an estate to

(1) [1897] A. C. 658, 667.

(2) 1 Rep. 936.

(3) [1916] 2 Ch. 161, *166.

(4) Amb. 453.

(5) L. R. 2 Eq. 682.

(6) [1916] 2 Ch. 161.

a grantee under a deed. Notwithstanding that the two expressions have these common attributes, I am of opinion that there is a clear distinction between them. The words "for ever" when following the word "heir" in my opinion have reference more particularly to the character in which the heir is to take the property and import the whole succession of inheritable blood—thus indicating that the heir is to take qua heir in a course of succession. This view seems to me to accord with the view taken both by Wood V.-C. in *Fuller v. Chamier* (1) and by Younger J. in *Silcocks v. Silcocks*. (2) On the other hand the word "absolutely" (a word which lawyers are more accustomed to find associated with a bequest of personalty) when following the word "heir" or "heir-at-law" in a devise of realty in my opinion has reference entirely to the nature of the estate which the heir is to take in the property devised to him; it imports ownership in the fullest sense of the word and operates to make the heir a new stirps and root of inheritance—thus indicating that the heir is to take by purchase as an individual person. In other words, in my opinion the word "absolutely" when used in such a context in a will has the same effect as if technical words of limitation had been used. This view as to the meaning and effect of the word "absolutely" is, I think, confirmed by a passage in the judgment in *Fuller v. Chamier* (3), in which Wood V.-C. makes use of this word in the sense which I have endeavoured to explain. The learned Vice-Chancellor states that he apprehends that it will be found that the exception in *Archer's Case* (4) was established upon the simple ground that the testator indicated an intention to attach words of limitation "so that the heir should take *absolutely*." In the result, for the reasons stated, I have come to the conclusion that the will in this case ought to be construed just as if instead of the word "absolutely" the words "heirs and assigns" had been inserted after the word "heir-at-law," and consequently that the devise in question falls within the exception to the rule in *Shelley's Case* (5) established by *Archer's Case*. (4)

P. O.
LAWRENCE
J.

1921

HUSSEY
AND
GREEN'S
CONTRACT,
In re.

HUSSEY,
In re.

HUSSEY
v.
SIMPES.

(1) L. R. 2 Eq. 682, 687.

(2) [1916] 2 Ch. 161, 166.

(3) L. R. 2 Eq. 682, 684.

(4) 1 Rep. 666.

(5) 1 Rep. 936.

P. O.
LAWRENCE
J.

1921

HUSSEY
AND
GREEN'S
CONTRACT,
In re.

HUSSEY,
In re.

HUSSEY
v.
SAMPFER.

I therefore hold that on the true construction of the will the testator's son William takes only [an equitable estate for life in the house in question. For the sake of simplicity I have confined my judgment to the devise of No. 1 Rockville, but it covers the devise of No. 2 Rockville in favour of the testator's son Herbert and his heir-at-law, which is framed in identical language. There will be a declaration on the vendor and purchaser summons that the vendor cannot make a title to the fee simple except under the Settled Land Acts and after trustees for the purposes of those Acts have been appointed.

[On the construction summons his Lordship made a declaration that on the true construction of the will the testator's sons William and Herbert took estates for life in the properties devised to them respectively with remainders to their respective heirs in fee simple as purchasers, and appointed two named persons trustees of the testator's will for all the purposes of the Settled Land Acts.]

Solicitors : *Rawle, Johnstone & Co., for Pinniger, Callaway & Pinniger, Westbury ; Taylor, Willcocks & Co., for F. Sylvester, Trowbridge.*

H. L. F.

IDEAL FILM RENTING COMPANY, LIMITED *v.* EVE J.
NIELSEN.

1921

Feb. 18, 21.

[1920. I. 1272.]

Landlord and Tenant—Underlease—Covenant not to assign without Consent—Cross-covenant by Lessor—Consent not to be unreasonably withheld—Private Company—Voluntary Liquidation—Reconstruction—Refusal of Consent to Assignments—Reasonableness.

By two underleases the defendant demised to the plaintiffs certain business premises, and the plaintiffs covenanted in each lease in identical terms that they would not assign the demised premises without the previous consent of the lessor, but the lessor covenanted with the plaintiffs not unreasonably to withhold such consent in the case of a respectable and responsible assignee. The plaintiffs were incorporated in 1913 to take over a small film-renting business, but had power by their memorandum to carry on the business of producers of films. They carried on at first a film-renting business, and shortly afterwards commenced a successful film-producing business as well, with a head office in London and separate premises in eleven of the large towns in the United Kingdom. In 1920, owing to the great need of more capital for the increasing business, the plaintiffs passed special resolutions for voluntary liquidation for the purpose of reconstruction. The new company was incorporated in 1920 as the Ideal Films, Limited, with a largely increased capital all fully paid up and with the view of carrying on exactly the same business as the old company under the same directors and staff. The defendant was informed of these facts and was offered any further information, but refused the request of the liquidator to consent to the assignment of the underleases to the new company. The grounds alleged for the refusal were that it was a new company which had done no business so far, and that the contemplated business of film producing was of a highly speculative character:—

Held, that the qualification of the lessee's covenant taking the shape of an express covenant by the lessor not to withhold his consent unreasonably did not put the lessee in a worse position than if there had been an express qualification in his own, but gave him a further remedy against the lessor; and if consent was unreasonably withheld the lessee could assign without it, and also bring an action for breach of the lessor's covenant.

Held also, on the facts, that the defendant's refusal was unreasonable, not being based on a reasonable apprehension of any change calculated to imperil the solvency of his tenants; and the plaintiffs were therefore entitled to a declaration of their right to assign the leases without his consent.

ACTION WITH WITNESSES.

The plaintiff company was a private company incorporated in 1913 under the Companies (Consolidation) Act, 1903, with

EVE J.
1921
IDEAL
FILM
RENTING
COMPANY
v.
NIELSEN.

a nominal capital of 5000*l.*, divided into 5000 shares of 1*l.* each, and it was formed to take over a small film-renting business carried on by H. Rowson and his brother Simon Rowson, and a few friends.

The company's head office was at Nos. 76 and 78, Wardour Street, in the county of London, and it had separate premises at eleven large towns, including Liverpool, Glasgow, Manchester, Birmingham, Dublin, Nottingham, etc. In the memorandum of association the objects of the company were numerous and included the carrying on of "the business of manufacturers, producers, and dealers in cinematograph films, machines and accessories," and also the manufacture, hiring, letting on hire, or dealing in films and cinematograph machines and all accessories used in the business of cinematograph entertainers. Shortly after its incorporation the company developed its business and started producing pictures as well as renting films, and ultimately became one of the largest producing companies in England. The defendant Niels Ove Nielsen was a Dane living and carrying on business at 76, Wardour Street, on part of the premises where the plaintiffs' offices were also situated.

By an indenture of underlease dated March 28, 1914, the defendant demised to the plaintiffs the ground and basement floors of the messuage and premises known as 76 and 78, Wardour Street, from March 25, 1914, for the term of fifteen and three-quarter years, less three days, at a rental of 650*l.* a year; and the plaintiffs covenanted with the defendant that they "will not assign, underlet, or part with the possession of the said premises, or any part thereof, without the previous consent in writing of the lessor, but the lessor covenants with the company not unreasonably to withhold such consent in the case of a respectable and responsible assignee or under-tenant," with a proviso that if any rent were in arrear for twenty days, or in the event of any breach of any of the covenants on the part of the company, or if the company should enter into liquidation, "whether compulsory or voluntary (other than for the purpose of reconstruction),"

or if its assigns should become bankrupt, the lessor might re-enter upon the demised premises.

By a second underlease dated July 18, 1917, between the same parties the defendant demised to the plaintiffs the third floor of the said messuage and premises 76 and 78, Wardour Street, from June 24, 1917, for the term of twelve and a-half years, less three days, at a rental of 350*l.* a year, and the plaintiffs covenanted with the defendant in identically the same terms as in the underlease of March 28, 1914, with the similar cross-covenant by the lessor, and the proviso as to re-entry.

Owing to largely increased business and the need of greater capital extraordinary general meetings of the plaintiffs were held on April 27, 1920, and May 12, 1920, and special resolutions were passed and confirmed respectively whereby the plaintiffs were wound up voluntarily for the purpose of reconstruction, and Harold Richard Horsley was appointed liquidator.

On May 17, 1920, notice was sent out to the creditors of the company for a meeting on June 1, 1920.

By a circular letter dated May 18, 1920, issued by H. Rowson and S. Rowson, the two joint managers and directors of the company to the shareholders, it was stated as follows: "We have much pleasure in informing you that owing to the enormous expansion in our business and the recent acquisition by us of the large and fully equipped studios at Elstree for the production of pictures on a large scale we have made arrangements for a considerable addition to our working capital. A new company is therefore being registered under the name of 'Ideal Films, Limited,' with fully issued capital of 115,000*l.* The whole of the staff, properties, liabilities, and management of the old company are being taken over by the new company as a going concern. We who have been acting as joint managing directors of the old company will continue to act as managing directors of the new company. . . . In order to give effect to the scheme of the new arrangement it has been necessary for the old company to go into voluntary liquidation." The circular concluded with a statement that there were "ample funds for meeting fully and promptly all

EVE J.

1921

IDEAL
FILM
RENTING
COMPANY
v.
NIELSEN.

EVE J. 1921
IDEAL
FILM
RENTING
COMPANY
v.
NIELSEN.

the creditors of the old company." The new company was incorporated on the same day as the Ideal Films, Limited, and the reconstruction agreement was dated May 19, 1920. The circular of May 18 was sent to the defendant, and in his reply on May 20, 1920, he said: "As you do not say anything about your intentions with regard to the premises here, and as I presume that after your present company has been finally wound up the lease will lapse, I am writing to enquire whether your directors would wish me to grant a lease to the new company, and, if so, what rent would they be prepared to offer"; and he suggested that a very substantial increase would not be an unfair thing to ask from a new company. On May 22, 1920, the liquidator wrote to the defendant drawing his attention to the provisions in the underleases, informing him of the voluntary liquidation and of the formation of a new company with largely increased capital, and formally requesting his consent for the assignment of the leases to the new company. To this the defendant replied on the same day requesting information as to the paid-up capital of the new company, the amount available for working it, and asking for copies of the memorandums of both companies. And in reply to the request for his consent to the assignment of the leases he said it was not quite reasonable to expect him to give his consent to the assignments and thereby incur risk in the case of a company that had done no business so far, and was "going to engage in the highly speculative business of film-manufacturing"; and he declined to grant the request. The meeting of creditors was held on June 1, 1920, at which the defendant was present and all information asked for was given. Then in a letter to the defendant from the plaintiffs' solicitor dated June 10, 1921, he says: "The position of affairs has been fully explained to you, but I write to inform you that the new company, 'Ideal Films, Limited,' has been registered with a capital of 115,000 l. shares, all of which have been issued, 58,650 having been issued for cash and have been fully paid. . . . You will see therefore that you will have as tenants a company of considerably greater financial stability than the

old company." Then later on he said: "With reference to your remarks as to the class of business to be undertaken by the new company I beg to inform you that the business to be carried on by them is exactly that formerly carried on by the old company. . . . As you know the old company although called the 'Ideal Film Renting Co., Limited,' has been a producing company also, and, in fact, one of the most well known and successful producing companies in the country. If you require any further information with reference to the new company which I am in a position to give I shall be happy to supply it." The reply from the defendant came in a very long letter of June 11, 1920, and in para. 5 of this letter he stated: "With regard to the giving of my consent to the assignment of the lease to Messrs. Ideal Films, Limited . . . I have to re-affirm my refusal." He then referred to the distinction between the class of business undertaken by the two companies by reason of the name and restated the substance of his two grounds for refusal because (1.) it was a new company, and (2.) the new company was embarking in a different class of business, and that therefore if the old company had become producers that was one strong reason for exercising the greatest care before granting a lease to them in their capacity as a new company.

On June 23, 1920, the writ was issued. The plaintiffs alleged that the defendant had broken his covenants by refusing to consent to the plaintiffs assigning the underleases to the new company, and claimed (1.) a declaration that, on the true construction of the underleases and in the events which had happened, the plaintiffs were entitled to assign to Ideal Films, Limited, the premises comprised in the underleases for all the respective residues of the terms thereby granted without any consent of the defendant, and that such respective assignments would not be a breach of covenant by the plaintiffs or give rise to any right of re-entry or forfeiture under the underleases; (2.) a declaration that by his refusals the defendant had broken his covenants; (3.) damages.

With regard to the respectability and responsibility of the new company it was proved that they produced films

EVE J.

1921

IDEAL
FILM
RENTING
COMPANY
v.
NIELSEN.

EVE J.
1921
IDEAL
FILM
RENTING
COMPANY
v.
NIELSEN.

adapted from plays and English classics, among others "Dombey & Son," "Vicar of Wakefield," "Masks and Faces," etc., and they engaged for their pictures all the first-class actors and actresses.

Since action brought, the new company had increased their capital from 115,000*l.* to 172,500*l.* by the issue of 57,000 new shares, all fully paid for in cash.

Clayton K.C. and *G. G. Solomon* for the plaintiffs. There is no question now of the respectability and responsibility of the proposed assignees. The two questions which arise are (1.) the true construction of the covenants in the under-leases, and (2.) whether or no the consent has been unreasonably refused. On the first point the covenant by the lessee not to assign without consent is a qualified covenant having regard to the word "but." It is in form a cross-covenant by the lessor which is somewhat unusual, and that gives the lessees an additional remedy, and cannot be less effective than the ordinary qualified covenant by a lessee.

The provision as to re-entry by the lessor on breach of covenant by the lessee in the event of a liquidation does not apply if the liquidation is for the purpose of reconstruction. On the question of the reasonableness of the refusal to consent by the defendant the first refusal was on May 22, after he had received the circular letter; the second refusal was on June 11, when he certainly knew all the facts as to the new company and was offered any further information he required. It was, on the authorities, wholly unreasonable: *Bates v. Donaldson* (1); *Young v. Ashley Gardens Properties, Ltd.* (2); *Waite v. Jennings* (3); *Jenkins v. Price* (4); *Evans v. Levy* (5); *West v. Gwynne* (6); *Willmott v. London Road Car Co.* (7); *Lewis & Allenby v. Pegge* (8); *Mills v. Cannon Brewery Co.* (9); and *Goldstein v. Sanders.* (10)

Gover K.C. and *R. L. Ramsbotham* for the defendant. There

(1) [1896] 2 Q. B. 241.

(2) [1903] 2 Ch. 112.

(3) [1906] 2 K. B. 11.

(4) [1907] 2 Ch. 229.

(5) [1910] 1 Ch. 453.

(6) [1911] 2 Ch. 1.

(7) [1910] 2 Ch. 525.

(8) [1914] 1 Ch. 782.

(9) [1920] 2 Ch. 38.

(10) [1915] 1 Ch. 549.

is no case to answer, as the action is misconceived. It is not the case of an ordinary qualified covenant, but an absolute covenant by the lessee and a cross-covenant by the lessor. And as the plaintiffs admit that if they succeed in their contention there is no damage, the action will not lie: *Treloar v. Bigge*. (1) As to the reasonableness of the defendant's refusal to consent, he thought, when writing the letter of May 22, 1920, in reply to the request for his consent, that the new company was about to engage in a highly speculative business of film producing, which was a new line altogether according to his knowledge at the time. He complained that the position of affairs was not then fully explained to him. Assuming now that the new company is a respectable and responsible under-tenant the question is whether the consent was unreasonably refused within the principle of *Bates v. Donaldson* (2) at the time when the defendant was asked to give it.

[EVE J. It was a continuing request down to the date of the writ.]

It was reasonable for the defendant to assume that there was something wrong to warrant the winding up of the old company. On the whole the defendant has not acted unreasonably.

Clayton K.C. in reply on the question of construction of the covenant referred to *Sheppard v. Hong Kong and Shanghai Banking Corporation* (3) and *Barrow v. Isaacs & Son* (4), where there were cross-covenants by the lessor. The plaintiffs are entitled at any rate to nominal damages for the breach of covenant by the lessor.

EVE J. [after stating the nature of the claim and reading the covenants in the underleases, continued:] The first question is, ought I to read the two covenants as separate and distinct covenants, or is the first one to be regarded as qualified by the second? It is established beyond controversy that if the covenant on the part of the lessee not to assign without consent is merely qualified by a proviso that the consent of the lessor is not to be unreasonably

EVE J.

1921

IDEAL
FILM
RENTING
COMPANY
v.
NIELSEN.

(1) (1874) L. R. 9 Ex. 151.

(3) (1872) 20 W. R. 459.

(2) [1896] 2 Q. B. 241.

(4) [1891] 1 K. B. 417.

EVE J.
1921
IDEAL
FILM
RENTING
COMPANY
v.
NIELSEN.

withheld, there is no implied covenant by the lessor that he will not unreasonably withhold his consent, and in the absence of an express covenant to that effect no action will lie against him for unreasonably withholding it. But even so the lessee is not left wholly without remedy, for if in fact the consent is unreasonably withheld he can effectually assign without consent. In these leases there is a qualification introduced, not by way of proviso in the lessee's covenant, but in the shape of an express covenant by the lessor not to withhold his consent. Does the fact that the qualification takes this form put the lessee in a worse position than if it had been introduced by an express qualification of his own covenant? I do not think it does. The course adopted gives the lessee a further remedy against the lessor, but it also in my opinion qualifies his own covenant, and if consent is unreasonably withheld the lessee can, in my opinion, assign without it and also bring an action for breach of the lessor's covenant. That brings me to the substantial question I have to decide: Has the consent of the defendant been unreasonably withheld to the making of these assignments? I agree that in answering that question I have to consider the circumstances and the knowledge of the lessor at the date when the request was made, but in this connection it must not be overlooked that the request was a continuing one down to the commencement of the action, and that a good deal happened between May 22, 1920, when the defendant received the first letter from the liquidator, and June 23, when the writ was issued. In considering the defendant's attitude I must, I think, pay regard to the circumstances subsisting at the later date. Was the defendant on that date acting reasonably in still withholding his consent? He seeks to justify his refusal on two grounds: the one that the proposed assignee was a new company which had so far done no business, and the other that the business of film producing which it contemplated undertaking was of a much more speculative character than the business of film renting, which was the business for which the lessee company had originally taken the premises. The answers to these objections are, to the

first, that the new company was merely the old company under another name but with an increased and reorganized capital, and to the second that the lessee company under its memorandum has express powers to produce films, and as a matter of fact for some years prior to 1920 and to the knowledge of the defendant had been carrying on business both as a film-renting and a film-producing company. The expressions are well understood in the trade. A renting company is one which buys films produced by others and then lets them to the proprietors of cinemas for exhibition to the public. A producing company is one which produces films and lets them to renters or otherwise disposes of them. The lessee company was primarily formed to do business as a renting company, but it soon began producing, and according to the evidence its producing business had by 1917 so developed that it was larger in volume than the renting business. I think it may almost be said that the business had been gradually changed from that of a renter to that of a producer, and the defendant admits that he had knowledge of the facts that the lessees were producing and not merely renting films.

The successful operations of the company and the fact that the original shareholders had allowed their profits to be utilized for the development of the business rendered a reconstruction desirable. I need not pursue this because it is conceded that there were adequate and bona fide reasons for such reconstruction; they were communicated to the company's creditors, including the defendant, in a circular letter dated May 18, 1920, which was followed by the letters of May 20 and 22. [His Lordship read the circular and referred to the material parts of the two letters.] At the meeting of creditors held on June 1 and attended by the defendant the nature of the proposed reconstruction and the reasons why reconstruction was considered necessary were explained.

Having regard to the information in his possession I do not think the defendant's objection on the ground that the new company had done no business was a reasonable one. There can be no doubt that he appreciated that the new company was for all practical purposes identical with the old one and

EVE J.

1921

IDEAL
FILM
RENTING
COMPANY
v.
NIELSEN.

EVE J. that the business it was formed to acquire and carry on was
1921 the going concern then being carried on at the demised
IDEAL premises, and elsewhere in many parts of the kingdom. In
FILM my opinion there is no substance in this objection as a basis
RENTING of his refusal to give his consent to the assignment.
COMPANY
v.
NIELSEN.

After the defendant's reiterated refusal to give his consent and a fortnight before the writ was issued a further letter was written to him by the company's solicitor. It is dated June 10 and was replied to by the defendant in a letter of the next day. [His Lordship read the material parts of the letter of June 10 and extracts from that of June 11.] No further information was asked for by the defendant and on June 23 the writ was issued. The defendant gave his evidence with perfect frankness, but he entirely failed to satisfy me that there was any real substance in his objection founded on the nature of the new company's business. The plaintiffs' witnesses denied in the box that the producing business was of a more speculative character than the renting one, but apart from this I am satisfied that the business of the new company is substantially the business which the old company had been carrying on to the knowledge of the defendant for many years past, and that his refusal was not based on any reasonable apprehension of any change calculated to imperil the solvency of his tenants. The fact is he was under the mistaken impression that the liquidation of the plaintiff company had automatically determined the leases, and in view of the increased value of the demised premises he was desirous, if possible, of obtaining a higher rent from the new company than that received under the existing leases, and he persuaded himself into the belief that there really existed adequate grounds for refusing his consent. I do not think there did. I think his refusal was unreasonable, and on these conclusions the plaintiffs are entitled to the declarations for which they ask. These will give them the full relief they require, and the defendant must pay the costs of the action. It is not a case even for nominal damages.

Solicitors : *Arthur S. Joseph ; Turner & McCandlish.*

G. M.

In re DUKE OF WESTMINSTER'S SETTLED ESTATES. SARGANT
J.
(No. 2.)

1921

DUKE OF WESTMINSTER *v.* EARL OF SHAFTESBURY. Jan. 13, 14;
Feb. 24.

[1920. W. 1227.]

Settled Land—Tenant for Life and Remainderman—Capital or Income—Power of Exchange—Power to acquire Surrender of Leaseholds—Exchange of Freehold Reversions for Short Term Leaseholds—Surrender and Merger of Leaseholds—Capitalisation of Part of increased Income—Settled Land Act, 1882 (45 & 46 Vict. c. 38), ss. 3, 21, 34, 53, 57.

By a settlement dated February 15, 1901, lands which included a large number of freehold reversions subject to building leases were settled in strict settlement and various powers were given to successive tenants for life "in addition to and in aid of the statutory powers." These included a power to "exchange for other manors, lands and hereditaments, . . . all or any of the said hereditaments hereby assured," and a power "in case any . . . lessee . . . of any part of the said hereditaments, . . . shall be willing to sell or dispose of . . . his subsisting interest, . . . to purchase the same . . . at such price or prices in money or for such other equivalent as" to the tenant for life should seem reasonable, "but so that the terms or interests which shall be purchased or otherwise acquired under the power shall be merged in and consolidated with the freehold and inheritance of the said premises."

By two deeds of even date the tenant for life conveyed to two persons some of the freehold reversions belonging to the settled estate, and by two further deeds of the same date received in exchange the surrender and merger of leaseholds to which other parts of the settled estates were subject, a sum being paid to the trustees of the settlement by way of parity of exchange which they applied in paying off incumbrances on the estate. The transactions resulted in a large increase of the annual income of the estate. The surrendered leaseholds were at the time of the transaction held upon terms that had less than sixty years to run:—

Held, as follows: (1.) Neither the power of exchange given by s.3 (iii.) of the Settled Land Act, 1882, nor the power of exchange created by the settlement enabled leaseholds with less than sixty years to run or any leasehold interests in land already comprised in the settlement to be taken in exchange, but the transactions could be regarded as cross-sales and purchases, and as such were valid.

(2.) Under s. 34 of the Act of 1882 an accumulation of part of the increased income resulting from the sale of the freehold reversions must be made during the residue of the terms of the leaseholds to which the conveyed reversions were subject.

(3.) No accumulation of increased income resulting from the acquisition of the surrendered leaseholds was requisite in view of the special power of acquiring leaseholds for surrender contained in the settlement. And

SARGANT
J.

1921

DUKE
OF

WESTMIN-
STER'S
SETTLED
ESTATES,
In re.

DUKE
OF

WESTMIN-
STER
v.
EARL
OF
SHAFTES-
BURY.

(4.) Assuming all the leaseholds to which the conveyed reversions were subject to have equal unexpired terms, there must be accumulated at compound interest out of the rents of the property comprised in the surrendered leaseholds an amount equal to 4 per cent. interest on the value of the surrendered leaseholds plus the annual benefit to the estate from discharging the incumbrances minus the annual rents of the leaseholds to which the conveyed reversions were subject.

Cottrell v. Cottrell (1885) 28 Ch.D. 628 and *In re Bowyer's Settled Estates* [1892] W. N. 48; 8 Times L. R. 441 applied.

ADJOURNED SUMMONS.

By a deed of settlement dated February 15, 1901, made upon the marriage of the plaintiff Hugh Richard Arthur Duke of Westminster, the family estates known as the Grosvenor estates, which included the London estates, were limited in the events which had happened to the use of the plaintiff for life with remainder to Lord Arthur Hugh Grosvenor for life with divers remainders over. Gerald Hugh Grosvenor, who was born on February 13, 1907, was the first tenant in tail in remainder.

By the settlement it was declared "that in addition to and in aid of the statutory powers of leasing and of sale enfranchisement exchange partition and other dispositions, and of investment or other applications of capital money in or for improvements and of mortgage and charge and of contract for any of the above purposes the said Hugh Richard Arthur Duke of Westminster during his life and every other person hereby made tenant for life of the said premises hereby assured when he or she shall be entitled to the possession or the receipt of the rents and profits of the same premises . . . shall have the following powers." Then came powers of sale, enfranchisement, exchange and partition, it being provided that the trustees of the settlement, who had previously been appointed trustees for the purposes of the Settled Land Acts, 1882 to 1890, should receive all moneys which might become payable upon any such sale, enfranchisement, exchange or partition upon trust to invest the same as capital money arising under the Settled Land Acts. The power of exchange was expressed in these terms: "Power to . . . exchange for other manors, lands or hereditaments in England and Wales all or any of the said premises hereby assured . . .

and upon any such exchange to give or receive any money for equality of exchange." It was also provided that "in case any present or future lessee of any part of the said premises hereby assured or to be purchased under the power in that behalf hereinbefore contained shall be willing to sell or dispose of or to give up or otherwise part with his subsisting interest in his lease or leases then and in every such case it shall be lawful for the person or persons exercising the said powers to purchase the same respectively at such price or prices in money or for such other equivalent as to them or him shall seem reasonable, and to direct the application in the purchase of the same accordingly of any money to arise by any such sale or enfranchisement or exchange or partition as aforesaid or (according to the circumstances) to accept a surrender of any such lease or leases upon any such terms as may be agreed upon. But so that the terms and interests which shall be purchased or otherwise acquired under the power shall be merged in and consolidated with the freehold and inheritance of the said premises or shall otherwise be disposed of in such manner as that the same shall go to and be held in trust for the person or persons for the time being entitled to the hereditaments comprised in or affected by the same respectively according to the nature and quality of the same terms and interests. . . ."

The plaintiff as tenant for life arranged two exchanges with Lord Ashcombe and trustees of Lord Ashcombe's settled property (hereafter called the Cubitt trustees) respectively. Both exchanges took effect as from September 29, 1916, although they were only completed by four deeds all dated March 19, 1920.

The first exchange was effected as follows. By deed dated March 19, 1920, the plaintiff "by virtue of the powers vested in him under the said Settled Land Acts and of every other power enabling" conveyed freehold hereditaments in Pimlico belonging to the London estate, subject to the leases and agreements for leases affecting the same, to Lord Ashcombe in fee simple in exchange for leasehold premises belonging to Lord Ashcombe and held by him of the Grosvenor estates

SARGANT
J.

1921

DUKE
OF

WESTMIN-
STER'S
SETTLED
ESTATES,
In re.

DUKE
OF

WESTMIN-
STER
v.

EARL
OF

SHAFTES-
BURY.

SARGANT
J.
1921
DUKE
OF
WESTMIN-
STER'S
SETTLED
ESTATES,
In re.
DUKE
OF
WESTMIN-
STER
v.
EARL
OF
SHAFTES-
BURY.
—

under leases granted by the plaintiff's predecessors in title for terms of years, which would expire not later than Michaelmas, 1937, and were subject to underleases or agreements for tenancy. The freehold reversions on some of these leases were vested in the plaintiff and by a deed of even date Lord Ashcombe surrendered these to the plaintiff to the intent that the terms of years granted by the leases might merge and be absolutely extinguished in the freehold reversion and inheritance of the premises or may otherwise go to and be held in trust so far as the rules of law and equity and circumstances may permit for the person or persons for the time being entitled to the freehold of the same premises. By the same deed the remainder of the leases agreed to be exchanged were assigned by Lord Ashcombe to the trustees upon the trusts of the settlement. The second exchange with the Cubitt trustees was effected in exactly the same manner.

The combined value, as on September 29, 1916, of the freehold reversions conveyed by the plaintiff to Lord Ashcombe and the Cubitt trustees was 284,143*l.*, and the combined value as on the same date of the leaseholds conveyed by Lord Ashcombe and the Cubitt trustees by way of exchanges was 228,224*l.* The total sum of 55,919*l.* was paid by Lord Ashcombe and the Cubitt trustees by way of equality of exchange to the trustees of the settlement of February 15, 1901, and applied by them in discharging incumbrances on the settled estates.

The net rents formerly received by the plaintiff from the freehold reversions amounted in the whole to 1785*l.* per annum, and the net rents formerly received by him from the leasehold premises comprised in the surrenders to 547*l.* On the merger of these leases the rack rents of the property comprised in the surrenders became payable to the plaintiff. They amounted together to 13,875*l.*, but in some cases the tenants from whom these rack rents were received were not or were only partially responsible for repairs and insurance. It was estimated that the net annual increase of rents produced by the exchange amounted to 11,000*l.* or thereabouts.

This summons was taken out by the plaintiff for the determination (amongst other questions) of the question whether the plaintiff was entitled to receive and retain for his own use and benefit the whole of the increased rental derived from this portion of the settled hereditaments the leases whereof were recently surrendered and assigned to the plaintiff in part exchange for other portions of the settled hereditaments conveyed and assured subject to the leases affecting the same to Lord Ashcombe and the Cubitt trustees as above stated, or whether the whole or any, and if so, what part of such increased rental ought to be set aside and paid to the trustees of the settlement as capital moneys or otherwise dealt with.

SARGANT
J.
1921
DUKE
OF
WESTMIN-
STER'S
SETTLED
ESTATES,
In re.
DUKE
OF
WESTMIN-
STER
v.
EARL
OF
SHAFTES-
BURY.

Maugham K.C. and *Baden Fuller* for the plaintiff. It is material to see to what extent this exchange could have been effected by the tenant for life under the powers of the Settled Land Act, 1882, and quite apart from the special powers of the settlement. Sect. 3 (iii.) of the Act sanctions an exchange "for other land" which, having regard to the definition of land in s. 2 of the Act, includes leaseholds. There is in the subsection no provision limiting the power of exchange to leaseholds having not less than sixty years to run, but this restriction may be impliedly imposed by s. 4, sub-s. 2, and by s. 21 (vii.), which limits the power of investment in leaseholds to those with not less than sixty years to run. In any case the process adopted here is not appropriate to an exercise of the power under the Act, as by s. 24, sub-s. 3, leaseholds acquired are to be conveyed to and vested in the trustees of the settlement. That course was not adopted, as it would have prevented merger. It follows that the transaction could not have been carried out completely under the powers conferred by the Act.

The powers conferred by the settlement are however saved by ss. 56 and 57 of the Act, and there is no provision in the settlement corresponding to s. 53 which places the tenant for life in his exercise of the powers conferred by the Act in a fiduciary position. Further, there is no restriction on the leaseholds to be taken in exchange under the power of exchange in the

SARGANT
J.
1921
DUKE
OF
WESTMIN-
STER'S
SETTLED
ESTATES,
In re.
DUKE
OF
WESTMIN-
STER
v.
EARL
OF
SHAFTES-
BURY.
—

settlement, and no ground therefore for compelling a capitalisation of any part of the rents resulting from the exercise of this power.

[SARGANT J. In so far as the settlement merely extends the powers conferred by the Settled Land Act, would not s. 53 apply?]

There is no room for its application if this power sanctions the acquisition by way of exchange of short term leaseholds. The later power to invest in and acquire the surrender of leaseholds obviously applies to short term leaseholds, for at the date of the settlement the leases to which the settled land was subject had less than sixty years to run. There is nothing to justify a narrower construction in the power of exchange. The transaction was validly effected under the settlement and no accumulation of income can be required: see *Earl of Lonsdale v. Lowther* (1) and *In re Hunloke's Settled Estates*. (2)

Cleveland-Stevens for the second tenant for life. This defendant desires to support the plaintiff's contention. There is nothing to show that in exercising the powers conferred by the settlement the tenant for life is bound to act as a trustee, and there is no provision for capitalising income. The position might be different if the plaintiff had carried out the transaction under the Settled Land Act, 1882; but the Court always assumes a party to carry out a transaction in the manner best adapted to carry out the intention: compare Farwell on Powers, 3rd ed., p. 300. Parker J. pointed out in *In re Rodes* (3) that at common law a legal tenant for life is not a trustee, and that is the position whenever he exercises powers other than those conferred by statute. Even if the plaintiff was in a fiduciary position, the transaction was a proper one on the evidence, and the plaintiff is entitled to the whole resulting income: see *In re Wix* (4) and *In re Lacon's Settlement*. (5)

Bryan Farrer for the trustees of the settlement.

Grant K.C. and *Harman* for the remainderman. There is

(1) [1900] 2 Ch. 687, 695.

(3) [1909] 1 Ch. 815.

(2) [1902] 1 Ch. 941, 944.

(4) [1916] 1 Ch. 279.

(5) [1911] 2 Ch. 17.

nothing in s. 3 (iii.) of the Act of 1882 to limit leaseholds taken in exchange to those having not less than sixty years to run, but the limitation must be inferred from s. 21 (vii.) and s. 53. Further, the limitation applies to the power of exchange in the settlement on its true construction; and even if it did not do so as matter of construction, it would be applied by s. 57, sub-s. 2, of the Act. The transaction must therefore be regarded as a sale of freehold reversions and an acquisition of the short term leaseholds for surrender. Sect. 34 applies to the whole transaction, with the result that the plaintiff is only entitled to so much of the income as would amount to the rent of the freehold reversions sold: *Cottrell v. Cottrell* (1); *In re Bowyer's Settled Estates*. (2)

SARGANT
J.
1921
DUKE
OF
WESTMIN-
STER'S
SETTLED
ESTATES,
In re.
DUKE
OF
WESTMIN-
STER
v.
EARL
OF
SHAFTES-
BURY.

Turning to the surrenders, they have been acquired or paid for, and are not therefore within s. 13 of the Act. Their acquisition out of capital moneys could only be effected under s. 21 (xi.), and it is in this respect only that the settlement has extended the powers conferred by the Act by sanctioning the acquisition for surrender of short term leaseholds. This is an "additional or larger power" within s. 57, sub-s. 2, and therefore exercisable "in the like manner, and with all the like incidents, effects, and consequences" as if conferred by the Act. Sect. 53 is therefore applicable, for there is no contrary intention within s. 57, sub-s. 2, shown by the settlement.

Maugham K.C. in reply. There is nothing in the Settled Land Act to limit the leaseholds taken in exchange under s. 3 (iii.), although any such exchange is of course subject to s. 53. But in any case the limitation to leaseholds having not less than sixty years to run does not apply to the power of exchange in the settlement. Further, s. 34 is inapplicable here. The plaintiff could, under the power conferred by the settlement of acquiring leaseholds for surrender, have acquired the leaseholds to which the freehold reversions he has parted with were subject and then sold the absolute interest in these premises. Out of the proceeds he could then have acquired

(1) 28 Ch. D. 628.

(2) [1892] W. N. 48; 8 Times L. R. 441.

SARGANT
J.
1921
DUKE
OF
WESTMIN-
STER'S
SETTLED
ESTATES,
In re.
DUKE
OF
WESTMIN-
STER
v.
EARL
OF
SHAFTES-
BURY.
—

the leasehold premises that have been surrendered. Had he adopted this form of transaction, s. 34 would have had no application. The effect therefore of the power of acquiring leases for surrender in the settlement is really to exclude the operation of s. 34. But even if it were held to apply, the Court has a discretion under s. 34 and might well say that there was no case for accumulation having regard to the alternative way of carrying out the transaction so as to render s. 34 inapplicable. Finally s. 53 is not made applicable to the powers in the settlement by s. 57, sub-s. 2: see *In re Lacon's Settlement*. (1)

[He also referred to *In re Griffith's Will* (2) and *In re Wilkes' Estate*. (3)]

Feb. 24. SARGANT J. delivered a written judgment in which, after stating the question raised by the summons, he continued: The answer to this question depends in my judgment partly on the general provisions of the Settled Land Acts and partly on the special provisions of the settlement of February 15, 1901. For while in my previous decision as to the question raised by this first head of the summons (*In re Duke of Westminster's Settled Estates*; *Duke of Westminster v. Earl of Shaftesbury* (4)) I came to the conclusion that the power then in question was a power apart from and independent of the Settled Land Acts, the contrary seems to be the case with the powers of sale, exchange and surrender which have now to be dealt with. As regards these powers, the settlement proceeds on the footing not of substituting a new or independent scheme for that contained in the Acts, but of adopting the general framework of the Acts and then introducing modifications into this framework. These modifications are no doubt, for the most part, in favour of the settlor as the first tenant for life, and of the subsequent successive tenants for life; and are in some cases important. But they are modifications only and not independent provisions. It is unnecessary and would be tedious to point out

(1) [1911] 2 Ch. 17.

(2) (1883) 49 L. T. 161.

(3) (1880) 16 Ch. D. 597.

(4) [1920] 2 Ch. 445.

all the passages in the settlement which have led me to this conclusion, and it will be sufficient if I refer first to the appointment of the settlement trustees to be the trustees for all the purposes of the Settled Land Acts; secondly, to the direction that the settlement trustees are to invest money payable on enfranchisement, sale, exchange, or partition as capital money arising under the Settled Land Acts; thirdly, to the provisions that leases or contracts for leases may be made without previous notice to any trustee; and, fourthly, to the very special provision that capital money arising under the Settled Land Acts may be applied for improvements by the direction of a tenant for life and without a scheme. All these provisions seem to me to recognize the general application of the Settled Land Acts to the settled property, and to proceed accordingly to take advantage of the Acts either with or without modification, or (in the last case) to give a new and independent power in addition to a power for the same purpose which is assumed to be already existing under the Acts. It follows then that in dealing with the transactions referred to in this question of the summons it is necessary to start with the presumption that ss. 34 and 53 of the Settled Land Act, 1882, apply; and then to consider how far, if at all, the settlement itself modifies the effect of those sections.

These transactions, viewed in relation to the settlement in question, amount in substance to a transfer to Lord Ashcombe and the Cubitt trustees (whom I will refer to collectively as the Cubitt Estate) of the freehold reversion (valued at a total sum of 284,143*l.*) in a number of houses subject to leases owned by the Cubitt Estate and to the acquisition of the leases belonging to the Cubitt Estate (valued at a total sum of 228,224*l.*) of other houses the freehold reversion in which was already comprised in the settlement. The net rents (without deducting income-tax) which were received by the Duke of Westminster before the transaction amounted in the case of the first set of houses (hereinafter called "the conveyed houses") to about 1785*l.* per annum, and in the case of the second set of houses (hereinafter called "the surrendered houses") to about 547*l.*; and on the

SARGANT
J.

1921

DUKE
OFWESTMIN-
STER'S
SETTLED
ESTATES,
*In re.*DUKE
OF
WESTMIN-
STER
v.
EARL
OF
SHAFTES-
BURY.
—

SARGANT
J.
1921
DUKE
OF
WESTMIN-
STER'S
SETTLED
ESTATES,
In re.
DUKE
OF
WESTMIN-
STER
v.
EARL
OF
SHAFTES-
BURY.

surrender of the leases of the surrendered houses the like net rents receivable by the Duke in respect of the surrendered houses amounted to about 13,875*l.* There was thus an increase in net rental of over 11,500*l.* per annum on the whole transaction beyond and in addition to the income derived from a sum of 55,919*l.* paid by the Cubitt Estate to the settlement trustees for equality of exchange and applied by them in the discharge of incumbrances on the settled estates. The question is whether the whole of this increased rental (to which must be added in my view the relief to income derived from the discharge of these incumbrances) is receivable and retainable by the Duke as income, or whether any and what part of this increase should be set aside and paid to the trustees as capital money or otherwise dealt with.

There are obviously two different and clearly distinguishable ways in which the transaction in question has benefited income at the expense of capital. In the first place the freehold reversion in the conveyed houses, which previously yielded only a net rental of 1785*l.* per annum, has been converted into a present sum of 284,143*l.* capable of yielding immediate income. And, in the next place, the greater part of this large sum—namely, a sum of 228,224*l.*—has been applied in the acquisition and merger of short leases, so as to convert the previous freehold reversion in the surrendered houses, which yielded only a net annual rental of 547*l.*, into a freehold in possession producing a net annual rental of 13,875*l.* per annum. And on the expiration of these short leases without any provision being made in the replacement of capital there will be an out and out loss to the capital of the settled estates of the whole of this sum of 228,224*l.* The result is a startling one, and is obviously incapable of justification except under some special provisions of the settlement.

The counsel for the plaintiff, as I understand their argument, justify the whole transaction under the power of exchange in the settlement, coupled with the power to apply capital in acquiring the surrender of leases of parts of the settled estates. They urge that there is nothing in the latter power to restrict it to the acquisition of leases having not less

than sixty years to run, as in the case of purchases of leaseholds under the Settled Land Acts; and indeed that any such restriction would be quite inappropriate having regard to the ordinary lengths of the unexpired leases on the Duke's London estates at the date of the settlement. And then they say that, this being so, the power of exchange in the settlement must be given a correspondingly wider effect; and that although under the power of exchange in the Settled Land Acts it would be inadmissible to receive in exchange terms of less than sixty years, yet under the powers of exchange in the settlement this restriction is removed at any rate as regards leases acquired for the purpose of surrender. Accordingly they argue that the Duke has a definite right as tenant for life to direct an exchange of the freehold reversion in part of the settled estates for a leasehold interest capable of surrender and merger in other parts of the settled estates.

SARGANT
J.
1921
DUKE
OF
WESTMIN-
STER'S
SETTLED
ESTATES,
In re.
DUKE
OF
WESTMIN-
STER
v.
EARL
OF
SHAFTES-
BURY.
—

To the first part of this argument I assent. In the provisions as to the acquisition and surrender of leases I can find no restriction or condition as to the lengths of the leases to be acquired and surrendered. And though the result of any such transaction must be to diminish capital for the purpose of accelerating the enjoyment by the tenant for life of the rack-rentals of the houses in question, the words are fairly clear and unequivocal, and there is nothing repugnant or indeed manifestly unreasonable in a stipulation of this kind for the special benefit of the Duke and the successive tenants for life. The loss of capital on any such acquisition would probably be far more than counterbalanced by the general increase in the capital of the settled estates*as subsisting building or repairing leases of other parts of the estate were falling in.

But with the second part of the argument I cannot agree. It was admitted by the counsel for the plaintiff, that the power of exchange in the Settled Land Act, 1882, could not be exercised for the purpose of taking in exchange any leaseholds having a shorter term than that authorized for the investment of capital moneys—namely, sixty years. And further the phraseology of the Act, which speaks of “an exchange of

SARGANT
J.
1921
DUKE
OF
WESTMIN-
STER'S
SETTLED
ESTATES,
In re.
DUKE
OF
WESTMIN-
STER
v.
EARL
OF
SHAFTES-
BURY.
—

the settled land or any part thereof for other land" would appear to be inapplicable to an exchange for a further interest in land already comprised in the settlement. Now the power of exchange in the settlement is couched in language almost identical with, and practically indistinguishable from, the power in the Act, and was no doubt intended to operate on the same general lines as the statutory power. And it would in my judgment be unsound to extend the power in the settlement beyond that in the Act, and to hold that it would include the acceptance in exchange of short leasehold terms in land already comprised in the settlement, merely because of the subsequent power to purchase such terms out of capital. It will be observed that this last power is a special and carefully limited one, and is in terms addressed to a purchase for money or some other equivalent only, whereas in the previous provisions the alternatives of purchasing or taking in exchange are expressly distinguished. And there is the less reason for straining the language of the settlement to enable a transaction of the kind in question to be carried out in this particular way, because it can readily be effectuated (apart from the special benefit to the tenant for life which the plaintiff is claiming) by cross sales and purchases.

I may add here that if contrary to my view the settlement does on its true construction enable a tenant for life to exchange part of the settled land for the surrender of short leases on a different part of the settled land, it by no means follows that he can give in exchange a part of the settled land which is subject to a short residue of a building lease or other beneficial lease, and retain for himself the whole advantage resulting both from the conversion of reversionary value into present value and from the conversion of present value into a short terminating interest. The advantage accruing from the second part of the transaction, the settlement has in my view given him. But as regards the first part of the transaction I am of opinion that under s. 53 of the Settled Land Act, 1882 (which does not seem to me in any way excluded by the settlement), the tenant for life would be bound to allow the account to be adjusted between income and capital, on

the same lines as those which ought to be adopted by the trustees had this part of the transaction been effected by a sale for cash. It would in my view be a breach of the statutory trust imposed on the tenant for life under s. 53, to utilize his power of exchange so as to substitute, for lands yielding little immediate income and whose main value was reversionary, other lands yielding a full rental in possession.

SARGANT
J.
1921
DUKE
OF
WESTMIN-
STER'S
SETTLED
ESTATES,
In re.
DUKE
OF
WESTMIN-
STER
v.
EARL
OF
SHAFTES-
BURY.
—

I now turn to consider what the result would be if the transaction were effected, in the way in which I think it must be deemed to have been effected, by a double and not a single process—namely, by a sale of the freehold reversion in the conveyed houses and an investment of the greater part of the proceeds in the purchase for surrender of the leases of the surrendered houses. And before doing so I would point out that the form of the documents does not preclude this effect being given to them. For although they indicate an exchange as what is primarily intended, if possible, and this would no doubt be the preferable course from the point of view of stamp-duty, yet they carefully provide for the exercise by the parties of all or any of the powers under the settlement or the Settled Land Acts which are necessary to carry out the transaction. And it is of course clear that what is in substance an exchange may be perfectly well arrived at by the double process in question: see *In re Brotherton's Estate*. (1)

So far then as the sale of the freehold reversion of the conveyed houses for total consideration of 284,143*l.* has to be considered, it is clear that under s. 34 of the Act and in view of the decisions in *Cottrell v. Cottrell* (2) and *In re Bowyer's Settled Estates* (3) the Duke and the other successive tenants for life would be entitled to receive during the residue of the term of the unexpired leases of the conveyed houses the annual sum of 1785*l.* only, and that the residue of the income of the purchase price of 284,143*l.* should be accumulated and added to the capital thereof until the expiration of that term.

(1) [1908] W. N. 56.
(2) 28 Ch. D. 628.

(3) [1892] W. N. 48; 8 Times L. R.
441.

SARGANT
J.

1921

DUKE
OF

WESTMIN-
STER'S
SETTLED
ESTATES,
In re.

DUKE
OF
WESTMIN-
STER
v.

EARL
OF
SHAFTES-
BURY.
—

This is simple enough as regards the sum of 55,919*l.*, received for equality of exchange and applied in discharging incumbrances on the capital of the estate and so relieving the Duke from payment of interest on that amount. If, for example, these incumbrances carried interest at 4 per cent., as they seem to have done, the result would be that income would obtain an annual relief of some 2236*l.* 15*s.*, and would accordingly have to be charged with an annual difference of some 451*l.* 15*s.* to be accumulated in the hands of the trustees.

But what as to the 228,224*l.* applied in acquiring the surrender of the leases of the surrendered houses? Had that sum represented ordinary capital moneys not subject to any accumulation, it might on the view above stated have been sunk in this acquisition for the benefit of those entitled to income during the residue of the term of the leases of the surrendered houses. In fact, however, the 228,224*l.* differed from ordinary capital moneys by being liable to have its income accumulated during the residue of the term of the conveyed houses instead of being paid to the tenant for life, and this liability must be provided for. But if this is done, there seems no sufficient reason for saying that the capital of the 228,224*l.* must also be preserved or replaced, and cannot be sunk or treated as sunk in the purchase of the leases in question. Or in other words the rights of the tenants for life and remaindermen under the settlement will be adequately preserved as regards this sum of 228,224*l.* if, during the residue of the term of the leases of the conveyed houses, there is retained out of the increased rents of the surrendered houses and accumulated for the benefit of capital an annual sum representing interest on this 228,224*l.*

The present case is a much more special and complicated one than either *Cottrell v. Cottrell* (1) or *In re Bowyer's Settled Estates* (2); and the words of s. 34 of the Settled Land Act do not lead so precisely and obviously to the result above stated as they did to the comparatively simple result in each of those two

(1) 28 Ch. D. 628.

(2) [1892] W. N. 48; 8 Times L. R. 441.

cases. But I think that under the words of s. 34 it is permissible to take into account, as has been done in arriving at the above result, that this particular settlement allows the proceeds of ordinary freeholds in possession to be sunk in the purchase and surrender of these leases. And further, the words of the section are permissive and discretionary rather than imperative (see per Kay J. in *Cottrell v. Cottrell* (1)), and do not force the Court to direct an accumulation both of capital and income which would deprive the tenants for life of a right to have capital sunk for their benefit in the purchase and surrender of short leases.

On the argument before me, counsel for the plaintiff as the first tenant for life claimed as income the whole excess rental from the surrendered houses, in addition apparently to the whole relief given by the application of the 55,919*l.* in discharge of capital incumbrances. On the other hand, counsel for the infant claimed an accumulation of the whole excess rents of these houses, on the principle of *Cottrell v. Cottrell* (1), without giving the plaintiff any credit for his special right to have ordinary capital moneys applied in procuring the purchase of the leases of the surrendered houses. And accordingly there has been no full consideration of any such intermediate view as has been indicated above, or of the precise consequences to which that view leads. The matter may, for instance, be complicated to some extent by the circumstance that the leases of the conveyed houses were due to expire at different dates; and some question may arise as to the rate at which interest should be calculated. But, as at present advised, and on the basis that the leases of the conveyed houses had all the same length of term unexpired, the figures should be worked out as follows. Take interest at 4 per cent. per annum on 228,224*l.*, which I calculate as being 9128*l.* 19*s.*; and add to this the sum of 451*l.* 15*s.*, being the excess of the relief afforded by the discharge of incumbrances over and above the rentals previously received from the conveyed houses. The resulting annual sum of

SARGANT
J.

1921

DUKE
OFWESTMIN-
STER'S
SETTLED
ESTATES,
*In re.*DUKE
OF
WESTMIN-
STER
v.
EARL
OF
SHAFTES-
BURY.
—

SARGANT J. 1921 DUKE OF WESTMINSTER'S SETTLED ESTATES, *In re.* 9580*l.* 14*s.* is the annual amount of income which should be accumulated at compound interest from the rents of the surrendered houses during the unexpired term of the conveyed houses ; and the residue of the rents of the surrendered houses during the same term should be paid and applied as income.

DUKE OF WESTMINSTER *v.* EARL OF SHAFTESBURY. It may be that the parties will desire to consider the matter for a short time, either from the point of view of working out more precise figures in case the leases of the conveyed houses were not due to expire simultaneously, or from that of the precise expression of the principle adopted, or from some other point of view. I am therefore prepared to allow the matter to be adjourned for a short time, and to have it spoken to on the minutes if the parties are unable to agree on the exact form of Order.

Solicitors : *Boodle, Hatfield & Co. ; Withers & Co. ; Nicholl, Manisty & Co.*

H. C. G.

Applied. *Re SHEP-*
HERD. [1949] 1 Ch. 116

In re WEDGWOOD.

Considered. *In re*
HOWELL, DEC'D.
[1952] 1 Ch. 261

ALLEN v. PUBLIC TRUSTEE.

[1919. W. 2449.]

C. A.

1920

Nov. 9, 10.

1921

Feb. 15.

Revenue—Legacy Duty—Estate Duty—Incidence—Settled Legacy—“Free of all death duties”—New Duty imposed after Death of Testatrix—Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 13—Finance Act, 1894 (57 & 58 Vict. c. 30), s. 5—Finance Act, 1914 (4 & 5 Geo. 5, c. 10), s. 14.

The words “free of all death duties” have no general meaning as applied to all wills, but must be construed according to the meaning given to them by the particular will under consideration. The natural time to ascertain the meaning of these words is when the legacies which are given free of all duties are paid in the sense of having been transferred out and out from the testator's estate. If it be intended to prolong this date to that of payment or transference to the ultimate beneficiary words should be used clearly expressing that intention.

Testatrix, by her will, dated June 26, 1913, bequeathed a number of pecuniary legacies, and amongst others a legacy of 5000*l.* to the N.A.-V. Society, and directed “that all legacies and annuities given by this my will or any codicil hereto . . . shall be paid free of all death duties.” She then devised and bequeathed all the residue of her real and personal estate to her trustees upon the usual trusts for sale and conversion, with a direction out of the proceeds “to pay and provide for my funeral and testamentary expenses and debts and the pecuniary legacies bequeathed by this my will or any codicil hereto and the duties on all legacies and annuities bequeathed free of all duties.” The beneficial trusts were to pay “free of all death duties” certain annuities with a direction to appropriate funds for answering them by the income thereof and then to pay to each of her nephews B. H. W. and J. I. W. “free of all death duties” the sum of 6000*l.*, and to her niece, M. E. W., “free of all death duties,” the sum of 1000*l.*, and to hold the residuary estate in trust for C. W. absolutely. She then declared that the sum of 6000*l.* was not to be paid to her nephew J. I. W., but was to be held upon certain trusts for him and other persons in succession. By a second codicil to her will, dated November 17, 1913, the testatrix reduced the legacy of 5000*l.* to the N.A.-V. Society to 2500*l.*, and directed that her will should be read and have effect as if a legacy of 2500*l.* “free of all death duties had been thereby bequeathed in lieu of the said legacy of 5000*l.*” She then bequeathed “free of all death duties” to her trustees 2500*l.* upon trust to invest the same and to pay the income to her sister, Lady F., for life and after her death as to both capital and income in trust for the N.A.-V. Society. The testatrix died on November 26, 1913. A summons was taken out by the surviving executor for the determination of the question as to the incidence of the legacy and estate duties which would become payable on the deaths of the respective tenants for life of the settled legacies, including the

C. A.

1921

WEDGWOOD,

In re.

ALLEN

*v.*PUBLIC
TRUSTEE.

legacy to the N.A.-V. Society. Sargant J. held that the legacy and estate duties would in each case be payable out of the corpus of the settled legacy and not out of the ultimate residue of the testatrix's estate.

On an appeal by the N.A.-V. Society :—

Held, that the legacy duty which would become payable on the N.A.-V. Society's legacy of 2500*l.* on the death of the tenant for life would be payable out of the ultimate residue of the testatrix's estate, but (Younger L.J. dissenting) that the estate duty would be payable out of the corpus of the settled legacy.

The nature and incidence of legacy duty and estate duty discussed.

In re Palmer [1916] 2 Ch. 391 followed.

In re Parker (1917) 117 L. T. 422 and *In re Stoddart* [1916] 2 Ch. 444 distinguished.

Decision of Sargant J. reversed as to legacy duty and affirmed as to estate duty.

APPEAL from a decision of Sargant J.

Frances Julia Wedgwood, by her will dated June 26, 1913, after appointing Wilfrid Baugh Allen and Cecil Wedgwood executors and trustees thereof, bequeathed a number of pecuniary legacies, one only of which, that to Charles Harold Herford, was expressed to be "free of all duties." Amongst these legacies was one of 5000*l.* to the National Anti-Vivisection Society. The testatrix then bequeathed to her trustees the sum of 1000*l.* upon trust for her niece Olive Wedgwood for life, and after her death upon the usual trusts for her children, and if there were no children it was to fall into residue. Then after giving the use and enjoyment of a freehold house to her niece Mary Euphrasia Wedgwood, the testatrix directed "that all legacies and annuities given by this my will or any codicil hereto . . . shall be paid free of all death duties." She then devised and bequeathed all the residue of her real and personal estate to her trustees upon the usual trusts for sale and conversion with a direction to them out of the net proceeds to "pay and provide for my funeral and testamentary expenses and debts and the pecuniary legacies bequeathed by this my will or any codicil hereto and the duties on all legacies and annuities bequeathed free of duties." She then directed her trustees to invest the residue and hold it upon trust in the first place to pay (free of all death duties) certain annuities with a direction to appropriate funds for answering them by the income thereof with resort

to the capital thereof, if necessary, and subject to these annuities to pay to each of her two nephews Bertram Hensleigh Wedgwood and James Ingal Wedgwood "free of all death duties" the sum of 6000*l.* and subject thereto to pay to her niece Mary Euphrasia Wedgwood "free of all death duties" the sum of 1000*l.* and subject thereto to hold her residuary estate upon trust for her cousin Cecil Wedgwood absolutely. The testatrix then declared that the sum of 6000*l.* before bequeathed to James Ingal Wedgwood should not be paid to him but should be retained and held by her trustees upon a discretionary trust for him during his life, and after his death upon trust for his children as therein mentioned, and in default of children upon trust for the Royal Society for the Prevention of Cruelty to Animals absolutely.

C. A.
1921
WEDGWOOD,
In re.
ALLEN
v.
PUBLIC
TRUSTEE.

The testatrix made a first codicil to her will dated November 14, 1913, whereby she revoked the directions in her will as to the freehold house, and in lieu thereof devised the same to her niece Mary Euphrasia Wedgwood absolutely, and directed that her executors should pay the estate duty and all duties in respect thereof, and she bequeathed to another legatee 500*l.* "free of all death duties."

She made a second codicil to her will dated November 17, 1913, and thereby reduced the legacy of 5000*l.* to the National Anti-Vivisection Society to 2500*l.*, and directed that her will should be read and have effect as if a legacy of 2500*l.* "free of all death duties had been thereby bequeathed in lieu of the said legacy of 5000*l.*" She then bequeathed "free of all death duties" to her trustees 2500*l.* upon trust to invest the same and to pay the income thereof to her sister Lady Katherine Euphemia Farrer for life, and after her death as to both capital and income in trust for the National Anti-Vivisection Society. She also bequeathed another legacy "free of all death duties."

The testatrix died on November 26, 1913.

By an order of the Court of Appeal dated October 29, 1914, and made in an action of *In re Wedgwood. Allen v. Wedgwood* (1), it was declared that Cecil Wedgwood held the ultimate residue

C. A. of the estate of the testatrix upon a trust for the application thereof as to both income and capital for the protection and benefit of animals in such manner as he should think fit, and that such trust was a good and valid trust for charitable purposes.

1921
WEDGWOOD,
In re.
ALLEN
v.
PUBLIC
TRUSTEE.

Cecil Wedgwood died on active service on or about July 3, 1916, and on July 16, 1917, the Public Trustee was appointed a trustee jointly with the surviving executor and trustee, W. B. Allen.

In consequence of the death of Cecil Wedgwood the duty of preparing the scheme for the application of the ultimate residue in accordance with the charitable trust devolved upon the Attorney-General, and in the course of its preparation the question was raised out of what fund the estate and legacy duty which would become payable in respect of the said legacies or sums of 1000*l.*, 6000*l.* and 2500*l.* on the deaths of the respective tenants for life ought to be paid.

The present originating summons was accordingly taken out by the surviving executor for the determination of the question.

The summons was heard on July 8, 1920, before Sargant J., who held that in the case of each of the three settled legacies the legacy and succession duties were payable out of the corpus of the legacy and not out of the testatrix's residuary estate.

The Anti-Vivisection Society, who were entitled to the legacy of 2500*l.*, subject to the life interest of Lady Katherine Farrer, alone appealed.

A. Adams for the appellant society. The question is whether the settled legacy given by the second codicil is liable to bear the legacy and estate duties which will become payable hereafter on the death of a living person—namely, Lady Farrer—or whether those duties will be payable out of the residue. The question is one of the construction of the particular will. Sargant J. has held that the legacy must bear both duties; but they arise under different Acts.

First, as regards the future legacy duty. That was imposed by the Legacy Duty Act, 1796 (36 Geo. 3, c. 52). Where

different rates of duty are payable by the tenant for life and remaindermen, the duty on the life interest is payable by four yearly instalments by the trustees; and the future duty is payable after the death of the tenant for life by the trustees: see s. 13. The duty can also be commuted under 43 Vict. c. 14, s. 11; and 44 Vict. c. 12, s. 43: see Hanson on Death Duties, 6th ed., p. 542.

C. A.
1921
WEDGWOOD,
In re.
ALLEN
v.
PUBLIC
TRUSTEE.

By the second codicil the legacy is bequeathed, free of all death duties, to the trustees. It is submitted that this must mean, free of all death duties in respect of the beneficial interests in the legacy; for a legacy to a trustee is not subject to any duty at all. The duty is imposed on a legacy given "to or for the benefit of" an individual, bearing a particular degree of relationship to the testator, or a stranger in blood: see Legacy Duty Act, 1796, s. 2.

The learned judge was not justified in holding that the exoneration from duty was satisfied by payment of the legacy duty which became payable in respect of the life interest on the testatrix's death; though even that construction involved some postponement, as the duty was payable by four yearly instalments. The direction in the will that the legacies should be paid free of duty, referred to payment by the trustees to the legatee, and not to payment by the executors to the trustees; for it was the object of the testatrix, not to relieve her executors from trouble, but to ensure the beneficiary receiving her bounty without any deduction; and the subsequent direction to the trustees to pay and provide for all duties on legacies given free of duty was intended to carry out the same principle. *In re Snape* (1) is an express decision in favour of the appellants; and on that point the decision has never been questioned. It is submitted therefore that at any rate as regards the future legacy duty, it ought to be borne by the residue.

As regards the future estate duty, that was in effect imposed after the testatrix's death by the Finance Act, 1914.

Under the Finance Act, 1894, s. 5, settlement estate duty became payable on the death of the testatrix on this settled

(1) [1915] 2 Ch. 179.

C. A.
1921
WEDGWOOD,
In re.
ALLEN
v.
PUBLIC
TRUSTEE.

legacy, and by sub-s. 2 of that section no estate duty would have become payable on the death of Lady Farrer.

The Finance Act, 1914, s. 14, abolished the settlement estate duty, and also abolished the exemption from estate duty on the death of Lady Farrer, the result being that upon the death hereafter of Lady Farrer estate duty will become payable upon this settled legacy.

It is submitted that that duty also ought to be borne by the residue.

The question is one of the construction of the particular will: see *In re Palmer* (1); but it is recognized in that case that the language may be such as to extend to a future duty imposed after the death of the testatrix: see per Lord Cozens-Hardy. (2) If the appellant is right on the question of the legacy duty, it becomes established that the testatrix did intend the residue to bear some future duties on the legacies; and she has expressed that intention by the use of the words, "free of all death duties." If those words are held to cover one future duty, it is submitted that they ought to be held to cover all. It may be disputed, what is the meaning of the words "free of all death duties"? but this testatrix has shown that she at any rate meant, free of all present or future death duties; and if any future duties are included, those imposed by the subsequent Act of Parliament ought to come within the same category, and *In re Palmer* (1) shows that they may do so. The testatrix has used a wide expression, and in previous cases the Court has attributed to those words a meaning which covers the present case. They have been held to mean free of all duties arising by virtue of the dispositions made by this my will: see per Sargant J. in *In re Stoddart* (3) and approved by Bankes L.J. in *In re Parker*. (4) In the present case the estate duty which will become payable on Lady Farrer's death, though not becoming payable on the testatrix's death, does become payable by reason of the dispositions made by the testatrix's will. The testatrix directs

(1) [1916] 2 Ch. 391.

(2) *Ibid.* 398.

(3) *Ibid.* 444.

(4) 117 L. T. 422; [1917] W. N. 233.

that the legacies shall be paid free of all death duties, and further directs the trustees to pay and provide for the funeral and testamentary expenses and debts and pecuniary legacies bequeathed by the will or any codicil and the duties of all legacies and annuities bequeathed free of duty. These words are wide enough to cover provision for future death duties, as held by Sargant J. in *In re Stoddart* (1); and it is submitted that there was no justification in the present case for confining the words "provide for" to provision for annuities.

The authorities are in favour of the appellants rather than otherwise. *In re Palmer* (2) is distinguishable, because in that case the sum of 25,000*l.*, about which the dispute arose, was not given free of duties in the first instance. There was no gift to any beneficiary of the corpus of that sum, except to the residuary legatees themselves, who would have had to bear the duty if the corpus had been given free of duty. *In re Stoddart* (1) is very like the present case; though the learned judge distinguished his own decision in that case on the ground that the direction was to pay duties on all the legacies "whether settled or otherwise," and legacies and annuities were to be "paid and enjoyed" free of death duties; but it is submitted that the words "whether settled or not" were not more extensive, though they were more emphatic than the words in the present case; and that the reference to "enjoyment" did not carry the matter further, because the act of enjoyment is merely correlative to that of payment, and what is paid by the executor or trustee would necessarily be enjoyed by the beneficiary, and what is not paid by the one cannot be enjoyed by the other. *In re Tinkler* (3) rather supports the appellants' view; as also does *In re Eve*. (4) In *In re D'Oyly* (5) there are observations of Neville J. which might appear adverse to the appellants, but these were disapproved of by Bankes L.J. in the Court of Appeal in *In re Parker*. (6) The last mentioned case is strongly in favour of the appellants.

C. A.

1921

WEDGWOOD,

In re.

ALLEN

v.

PUBLIC
TRUSTEE.

(1) [1916] 2 Ch. 444.

(2) *Ibid.* 391.

(3) [1917] 1 Ch. 242.

(4) [1917] 1 Ch. 562.

(5) *Ibid.* 556.

(6) 117 L. T. 422.

C. A. The respondents say that great inconvenience would be
 1921 occasioned in the administration of estates, if the view of
 WEDGWOOD, the appellants were adopted, but in *In re Parker* (1) Swinfen
In re. Eady L.J. points out that it would not be right to say
 ALLEN that because of inconvenience in administration the testator
 v. must have meant that some only of the duties included in
 PUBLIC the terms used in the will should be borne by the residue.
 TRUSTEE. Moreover there is power under the Finance Act, 1894, s. 12,
 — to commute future estate duty, which would in many cases
 avoid the difficulty. Before the Finance Act, 1914, was
 passed it was held that a gift "free from duty" in a will made
 in 1893 exonerated the legatee from the new duties subse-
 quently imposed by the Finance Acts of 1894 and 1896 :
 see *In re Turnbull*. (2)

In the present case it is submitted that the intention of the
 second codicil was merely to substitute a clear net gift of
 2500*l.* in favour of the appellants for the similar sum which
 they would have taken free of duty immediately on the
 testatrix's death under the will, and in effect simply to charge
 that sum with a life interest in favour of Lady Farrer.

[YOUNGER L.J. referred to *In re Parker-Jervis*. (3)]

Austen-Cartmell for the Attorney-General representing the
 residue. The only question remaining for decision is as to the
 estate duty which will become payable on the death of Lady
 Farrer.

In re Palmer (4) is the governing authority, and lays down
 the principle that every will must be construed according to
 its own terms. The point as to legacy duty can be determined
 without reference to the question as to estate duty. Legacy
 duty is a true tax on the benefit given by the testatrix to the
 legatee. That distinguishes legacy duty from estate duty.
 There is no strict analogy between the Legacy Duty and
 Succession Duty Acts and the Finance Acts.

The decision in *In re Parker* (1) turned on the construction
 of the words of the particular will. This estate will have to
 be administered as an estate before estate duty becomes

(1) 117 L. T. 422.

(2) [1905] 1 Ch. 726.

(3) [1898] 2 Ch. 643, 653.

(4) [1916] 2 Ch. 391.

payable. All legacy duty is fixed at the death of the testator. It is imposed as the result of the testatrix's will, and arises at the time the legacy is appropriated property.

It is submitted that even if Sargant J. was wrong on the point as to legacy duty he was right on the point as to estate duty.

The Attorney-General is willing to pay legacy duty on the death of Lady Farrer, the tenant for life, on the 2500*l.*, but not the estate duty on her death.

It is submitted that when a testator speaks in his will of death duties he means duties arising on his own death.

The cases cited by the appellants as being in his favour are all cases which depended on the particular words used in the will. Here the question depends on the construction of the words used in this particular will.

A. Adams in reply.

Cur. adv. vult.

1921. Feb. 15. The following written judgments were delivered.

LORD STERNDALÉ M.R. This appeal from Sargant J. raises a question now of frequent occurrence as to the incidence of legacy and estate duties payable in respect of a settled legacy.

The circumstances of the two duties differ. With regard to the legacy duty the law is the same now as at the date of the will, whereas with regard to estate duty a duty has been imposed by legislation subsequent to the date of the will and also to the death of the testatrix which was not chargeable in respect of this legacy before that legislation.

The judgment of the learned judge dealt with three settled legacies and decided that in each case the legacy and estate duties were payable out of the corpus of the legacy and not out of the testatrix's residuary estate. The legatees interested in two of these legacies have not appealed, and this case is concerned only with the third, a legacy to the Anti-Vivisection Society, subject to a life interest in favour of the testatrix's sister. [His Lordship stated the facts and the material provisions of the will and second codicil and continued:]

C. A.

1921

WEDGWOOD,

In re.

ALLEN

v.

PUBLIC
TRUSTEE.

C. A. The three legacies in question before Sargant J. were those of
 1921 1000*l.* and 6000*l.* bequeathed by the will for the benefit of
 WEDGWOOD, Olive and James Ingal Wedgwood, and that of 2500*l.*
In re. bequeathed by the codicil for the benefit of the National
 ALLEN Anti-Vivisection Society. Each of these must be considered
v. in relation to the words used in the will or codicil concerning
 PUBLIC it, but I can see no material difference in the three. In the
 TRUSTEE. case of the 1000*l.* there are no words concerning an exemption
 Lord Sterndale from duties in the bequest itself; in the case of the 6000*l.*
 M.R. when first mentioned as an absolute bequest to be paid at
 ——— once it is stated to be free of all death duties, and these words
 are not repeated in the subsequent dispositions of the fund;
 and in the case of the 2500*l.* the bequest is “free of all death
 duties to my trustees.” The general clause, however, that
 all legacies given by the will or any codicil thereto shall be paid
 free of all death duties is applicable to all three legacies unless
 there is something in the general clause inconsistent with the
 words of the particular bequest, and I can see no such incon-
 sistency. In order to carry out the bequest of the 2500*l.*
 the executors have to pay the sum to the trustees, and it is
 immaterial that they are themselves the trustees, the appro-
 priation in their own hands of a sufficient sum to meet the
 legacy has the same effect as if it had been paid to separate
 trustees. I think also that the subsequent clause directing
 the trustees in their capacity of executors to pay and provide
 for the duties on all legacies bequeathed free of duties applies
 to all three legacies. There is however a difference in the
 history of the three bequests. In the case of the 2500*l.* the
 testatrix divided a sum of 5000*l.* originally bequeathed
 to the National Anti-Vivisection Society immediately into
 two halves; in the case of one she left it subject to the original
 dispositions, in the case of the other she interposed the life
 interest of her sister. I shall consider later whether this
 difference in the history affects the construction to be put
 upon the bequest.

I think it is well to bear in mind that when the settled legacies are satisfied by an appropriation by the executors in their hands as trustees they are just as much paid to use the

words of Sargant J. "out and out as regards the testatrix's estate" as the unsettled legacies when paid to the beneficiaries, or as if they had been paid into the hands of separate trustees.

The question to be decided is whether the legacy and estate duties or either of them which will become payable on the death of Lady Farrer in respect of the 2500*l.* will be payable out of the ultimate residuary estate of the testatrix or out of the settled legacy.

C. A.
1921
WEDGWOOD,
In re.
ALLEN
v.
PUBLIC
TRUSTEE.
—
Lord Sterndale
M.R.
—

It is, I think, useful to see the nature of these two duties, although legacy duty is not of practical importance in this case, because it has been commuted by the executors under s. 11 of 43 Vict. c. 14, and they do not in any event ask to have the sum paid as commutation returned. This legacy duty is payable by the executors and *prima facie* would be payable at once, but as the rate payable by the persons ultimately entitled may not be the same as that payable by the tenant for life, it is provided by the Legacy Duty Act, 1796, s. 12, that the payment is postponed till the death of the tenant for life, although the liability arises at once. The executors still remain chargeable with the duty, and there is no difficulty in their providing for this payment by retaining, if necessary, duty at the maximum rate and distributing the rest of the estate. There is this bare possibility, that the rates of legacy duty may be altered by *ex post facto* legislation affecting the estates of persons who have died before the legislation and whose estates are already in course of administration, but it is so unlikely as to be negligible.

Estate duty stands in an entirely different position. At the time of the making of this will and also at the time of the testatrix's death, if that be material, which I do not think it is, there was no estate duty payable in respect of this legacy, but by the Finance Act, 1914, settlement estate duty which was previously charged was abolished and an estate duty payable on the death of the tenant for life was imposed. This duty was payable on succession, not to the testatrix but to the tenant for life. It is quite true that this legislation was passed very shortly after the testatrix's death and before the executors had fully administered the estate, but that is an

C. A. accident ; if the appellants be right in this case, the executors
 1921 would be liable to pay estate duty or any death duty, what-
 WEDGWOOD, ever its name, imposed by any legislation passed during the
In re. life of the tenant for life which might be a period of many
 ALLEN years.
v.

PUBLIC It is also possible that during that time the amount of estate
 TRUSTEE, duty may be increased, and that is not only possible but
 Lord Sterndale probable considering the present state of finance. Then the
 M.R. estate duty is chargeable upon persons and in a manner
 altogether irrespective of the testatrix's estate. The rate of
 duty is ascertained by aggregating the legacy, not with the
 testatrix's estate, but with that of the tenant for life, because
 the succession is to her, and when the rate is ascertained the
 duty is chargeable by the Finance Act, 1894, s. 8, sub-s. 4,
 s. 9, sub-ss. 1, 4, 5, upon the trustees to whom the legacy is
 left, upon the legacy itself, or upon the executors of the tenant
 for life.

It is difficult to see how the executors of the testatrix can provide for such a duty in many cases without delaying the administration of the estate for years. There are two factors which must be unknown—the state of the legislation as to death duties which may exist at the death of the tenant for life, and the amount of the estate of the tenant for life which regulates the rate of the duty.

In *In re Parker* (1), to which I shall have to refer later, Swinfen Eady L.J. said that the executors could retain the maximum amount of the duty. With respect, I think this was a slip (a most unusual thing in the case of that learned judge) into which he was led by the fact that in that case the Finance Act, 1914, was in existence at the date of the will though unknown to the draftsman. There was, therefore, when the amount of the tenant for life's estate was ascertained, a figure in existence which was the then maximum, though even in that case it was liable to be altered by subsequent legislation. But where subsequent legislation has to be considered there is no maximum in existence, and the executors must provide against all contingencies. In a

(1) 117 L. T. 422.

case where, as in this will, the settled legacy is small in proportion to the residue, provision may be made by retaining an amount equal to a large proportion or even the whole of the legacy, but where the settled legacies are large and the ultimate residue small, as is often the case, the estate duty on the legacies, especially where the estate of the tenant for life is large, may well exceed the residue and the whole administration of the estate must be delayed till after the death of the tenant for life. A construction, therefore, which throws all death duties which may be in existence at the death of the tenant for life, whether chargeable upon her executors or not, on to the residue, gives rise to great difficulties in administration, and, while I entirely agree with the statement of Swinfen Eady L.J. in *In re Parker* (1) that difficulties of administration cannot destroy the clear meaning of a testator's words, such difficulties do require that it should be quite clear that the words do create them.

Having now examined the nature of these two duties it is necessary to inquire in what way they are dealt with in this will.

I think it is settled that the words "free of all death duties" have no general meaning as applied to all wills, and that they must be construed according to the meaning given to them by the particular will under consideration. Two meanings were mentioned in argument: (1.) "free of all death duties arising in consequence of my death" and (2.) "free of all death duties arising in consequence of the dispositions made by my will." The former meaning would exclude this estate duty, the latter would include it, and it was argued that the latter meaning had been adopted by the Court of Appeal in *In re Parker*. (1) It certainly was adopted as the correct meaning in that particular will, but I think it is quite clear that it was not adopted as the correct meaning to be applied to all wills. Such a decision would have been in direct opposition to *In re Palmer* (2), and in that case the Court would have expressed some disapproval of that decision; but Swinfen Eady L.J., in giving judgment in *In re Parker* (1),

C. A.

1921

WEDGWOOD,
In re.

ALLEN

v.

PUBLIC
TRUSTEE.Lord Sterndale
M.R.

(1) 117 L. T. 422.

(2) [1916] 2 Ch. 391.

C. A. referred to *In re Palmer* (1) without disapproval as distinguish-
 1921 able and proceeding upon terms in a will different from those
 WEDGWOOD, of the will under his consideration. I think, therefore, that
In re. it is established by authority that the words must be con-
 ALLEN strued together with the rest of the will to ascertain what duties
v. were meant to be thrown upon the residue with the result of
 PUBLIC exempting the corpus of the settled legacies from them.
 TRUSTEE.
 Lord Sterndale M.R.

Looking at this will I think that the language points to the same conclusion as that at which the Court arrived in *In re Palmer* (1)—namely, that the death duties mentioned in it are those chargeable at the time of the payment or transfer of the legacies whether settled or absolute. I have already set out most of the provisions of the will, but I may shortly mention again those relating to the settled legacies. The sum of 1000*l.* given for the benefit of Olive Wedgwood is in these words [His Lordship read the terms of the bequest], and the exemption from death duties is derived from the general clause by which all legacies are to be paid free of all death duties. The sum of 6000*l.* bequeathed for the benefit of J. I. Westwood is dealt with in this way: “I declare that the said sum of 6000*l.* hereinbefore bequeathed to my said nephew James Ingal Westwood . . . shall not be paid or transferred to him, but shall be held by my trustees upon trust,” etc., and by this clause a payment to or appropriation by the trustees for the benefit of J. I. Wedgwood is substituted for the absolute payment to him directed by the earlier part of the will. So far, therefore, as the will is concerned I think the true construction is, as in *In re Palmer* (1), that the time at which the death duties chargeable upon the residue is to be ascertained is the time of payment. With regard to the codicil I think it is equally clear if not more so. The words are “I bequeath free of all duties to my trustees,” etc., pointing clearly, in my opinion, to the time of payment to the trustees as the time at which the death duties were to be ascertained, and I have already said that, in my opinion, appropriation in the hands of the executors as trustees is the same as payment to independent trustees. I think also that

the general clause as to payment of legacies free from all death duties applies to this legacy as well as the others.

C. A.

1921

In my opinion the natural time to ascertain the meaning of the words "free of all death duties" is when the legacies are paid in the sense of having been transferred out and out from the testator's estate, and this is shown more strongly to be the case when the expression to be paid free of all death duties is found as in this case.

WEDGWOOD,
In re.
ALLEN
v.
PUBLIC
TRUSTEE.
Lord Sterndale
M.R.

If it be intended to postpone this date to that of payment or transference to the ultimate beneficiary words should be used clearly expressing that intention. It can, of course, be done, but I think it should be done by clear words, and I find no such words in this will.

I do not think that this conclusion is in conflict with any of the decisions. The most important from this point of view is *In re Parker*. (1) I have already said that I do not think that case decided that any general rule existed as to the meaning of the words "free from all death duties," and the words of the will were very different. So far as I can gather from the report, there were no words such as this will contains referring to payments, and the words charging all death duties upon the residue were much stronger. Whether the reasoning of that case and of *In re Palmer* (2) is quite consistent or not, the decision is not, in my opinion, opposed to the conclusion at which I have arrived. Future duties not chargeable by reason of the death of the testator may be charged upon the residue to the exoneration of particular settled legacies. Whether they are so charged or not depends upon the construction of each particular will, and on the construction of this will, in my opinion, they are not so charged.

The result is that the legacy duty which becomes due at once, although the payment of a part of it is postponed, is, by the will, payable out of the residue, and to this extent I differ from Sargant J. before whom, as before us, not much stress was laid on this point. With regard to the estate duty, I agree with the learned judge that it is payable out

(1) 117 L. T. 422.

(2) [1916] 2 Ch. 391.

C. A. of the corpus of the settled legacy and not out of the
1921 residue.

WEDGWOOD,
In re.

ALLEN

v.

PUBLIC
TRUSTEE.

Lord Sterndale
M.R.

I wish to deal with a point made in order to show that I have not overlooked it. It was argued with force that the history of this legacy showed that the intention of the testatrix was that when the National Anti-Vivisection Society came into possession of the 2500*l.* bequeathed, subject to the life interest, it should be received net like the 2500*l.* already received, and, therefore, in respect of their legacy, at any rate, "free of all death duties" must have a meaning which would ensure this result. I think it may be a fair inference that this intention existed, though I doubt its being much, if any, stronger in the case of this than in the case of the other settled legacies. The testatrix, or, perhaps it should be said, the draftsman of the will, thought that this object was attained in the case of all the settled legacies, and so it was as the law then stood on the construction of the will which I think the correct one, and it was only the subsequent legislation creating a duty which was not one chargeable upon the executors or arising as a duty on succession to the testatrix but to the tenant for life which made the difference. I think it a merely speculative question what the testatrix would have answered if she had been asked whether she meant the legacies to be free of any duties which might be created by any legislation after the payment of the legacies to the trustees and before the death of the tenant for life, and had been informed that if the will so provided the administration of her estate might be delayed for years. I think to enter upon such speculations is to run the risk of confusing two separate questions—namely, what provision does the Court think the testatrix would have made if she had known all the circumstances, and what are her wishes as expressed by the provisions of the will which she did in fact make.

I think the appeal should be allowed as to legacy duty and dismissed as to estate duty.

WARRINGTON L.J. The question in this case is whether the estate duty which will become leviable on the death of

the person entitled for her life to the income of a settled legacy bequeathed by the will of the testatrix will be payable out of the corpus of the legacy or out of the general estate of the testatrix. Sargant J. on the construction of the will has held that the duty will be payable out of the corpus of the legacy. The legatees of the corpus appeal.

C. A.
1921
WEDGWOOD,
In re.
ALLEN
v.
PUBLIC
TRUSTEE.
Warrington L.J.

The order of the learned judge dealt with two other settled legacies, but the legatees interested therein do not appeal.

The persons entitled to the legacy in question in succession to the tenant for life are chargeable at a rate different from that at which the tenant for life is chargeable and accordingly under the well-known provisions of the Legacy Duty Act, 1796, s. 12, the duty on the corpus of the legacy would not be payable until the death of the tenant for life. The learned judge has held that this duty also is payable out of the legacy and not out of the residue. This last question did not really arise, for it now appears that, pursuant to s. 11 of 43 Vict. c. 14, the duty so payable in the future has been commuted for a present payment, and has been paid by the executors out of the general estate and the residuary legatees make no claim for repayment. Incidentally, however, for the purpose of arriving at the true construction of the will, it may be desirable to consider the position of the legacy duty and to determine whether, for the purposes of this will, it stands on the same footing as the estate duty.

The will and two codicils by the second of which the legacy in question was bequeathed were all made in 1913, and the testatrix died in the same year.

At this time the legal position as regards estate duty was that, in addition to ordinary estate duty payable in respect of the general estate settlement estate duty was payable in respect of the settled legacy, and, by the operation of sub-s. 2 of s. 5 of the Finance Act, 1894, no estate duty would be payable in respect of the settled legacy on the death of the tenant for life. But for this relief the corpus of the legacy would be property passing on the death of the tenant for life, estate duty would be payable in respect thereof under s. 2, sub-s. 1 (b), and its value would be aggregated with the

C. A. rest of her estate for the purpose of ascertaining the
1921 rate of duty.

WEDGWOOD, By the Finance Act, 1914, the relief afforded by s. 5, sub-s. 2,
In re. of the Act of 1894 was abolished in a class of cases of which
ALLEN the present is one and settlement estate duty ceased to be
v. payable in respect of the settled legacy.
PUBLIC
TRUSTEE.

Warrington L.J.

The result is, therefore, that on the death of the tenant for life, who is still living, the corpus of the legacy will be included in the property passing on her death, and the rate of duty will depend on the amount or value of her estate, and on the legislation in force at her death. It is, therefore, impossible at the present moment to ascertain, or even to estimate, with any certainty, what sum would be required to meet the duty in question, and if the amount of the settled legacy were large in comparison with the rest of the estate, and if it were necessary for the executors to retain moneys for the purpose of meeting the future duty, the distribution of the residue might quite possibly be held up altogether until the death of the tenant for life, an event which might happen many years after the death of the testatrix. Moreover, the executors of the testatrix are not accountable for the estate duty in question, and it is no part of their duty, in the administration of the estate of their testatrix, to pay or provide for it. There are no means by which the estate duty could be compounded for and paid by the executors of the testatrix; in fact, the materials necessary for ascertaining the amount of a composition, even if it were allowed by statute, do not in this case exist.

Whether under these circumstances the duty is as between the persons interested payable out of the general estate is a matter dependent entirely on the proper construction of the will. [His Lordship stated the facts and the material provisions of the will and codicils and continued:] The question to my mind turns on the true effect of the clause directing that all legacies are to be paid free of all death duties. The fact that in addition to these general words we find that certain legacies, including the 2500*l.* in question, are bequeathed free of all death duties does not, in my opinion, affect the

true construction of the will ; under the direction in question all legacies are on the same footing, and there is nothing in the will or codicils which indicates that some legacies should be in a better or worse position than others in respect of duties. I regard the general clause as explanatory of the expression "free of all death duties" where she uses it and extending the same freedom to those legacies in respect of which she does not use it.

C. A.
1921
WEDGWOOD,
In re.
ALLEN
v.
PUBLIC
TRUSTEE.
Warrington L.J.

It is now settled, so far as this Court is concerned, that the question whether a direction, of the nature of that the meaning of which we have to determine, extends to cover a duty not in force at the death of the testator cannot be determined by reference to any general principle, but is one of construction depending on the terms of the particular will: *In re Palmer* (1), and in particular the judgment of Pickford L.J.

Are the words in question, coupled, of course, with the correlative direction found in the trusts of the residue (namely, the direction to pay and provide for the duties on all legacies and annuities bequeathed free of duties), sufficient to include the estate duty in question ?

It is important to bear in mind that this duty is not payable by the executors, and, indeed, is not leviable at all until the death of the tenant for life. The duty then becomes leviable, not because the property passes on the death of the testatrix, but because it passes on the death of the tenant for life ; it is aggregated with her own property for the purpose of ascertaining the rate.

In this respect it differs from legacy duty, which becomes chargeable at once and payable by the executors, though that part of it which is referable to the reversionary interest is payable in futuro. Moreover, the amount of the estate duty which will be leviable is altogether uncertain, whereas that of legacy duty is ascertained and could only be altered by ex post facto legislation, which is not likely to be enacted.

With all respect to Sargant J., I think I should have held that the legacy duty, including that part of it the payment

(1) [1916] 2 Ch. 391, 401.

C. A. whereof was postponed, was payable out of the general estate.
 1921 I see no difficulty in holding that the executors can literally
 WEDGWOOD, follow the directions of the will, and pay the legacy to the
In re. trustees free of legacy duty, as well that part of it which
 ALLEN is chargeable on the reversion as that which is chargeable
v. on the tenancy for life. The amount of both duties is
 PUBLIC TRUSTEE. ascertained, and the executors can without inconvenience
 Warrington L.J. retain a sum sufficient to meet the proportion payable in
 futuro.

But the case is different in respect of the estate duty in question. When the testatrix directs that the legacies are to be paid free of all death duties, I think, in the absence of any expression indicating a more liberal intention on her part, she would properly be held to be thinking only of those duties which are leviable at the time of payment and the amounts of which are capable of being then ascertained and are payable by her executors in performance of their duty in the administration of her estate.

The question is one of construction, and, therefore, authorities are in general not of much assistance, but in this case we have the guidance of the reasoning of the members of this Court in *In re Palmer* (1), and I think we could not adopt the view contended for by the appellants without differing from it. I accept their reasoning, as did Sargant J., and I think his judgment should on this point be affirmed.

Neither *In re Stoddart* (2) nor *In re Parker* (3) is, in my opinion, in conflict with this view. In the former the words were "paid and enjoyed," this last word pointing to duties affecting the beneficial enjoyment of the legacy, whether in force at the date of payment to the legatees or not. In the latter the words were "shall be free of legacy duty, succession duty, settlement estate duty and all other death duties." Now in that case the will was after the Finance Act, 1914, and, if the direction did not include the estate duty payable by reason of the provisions of that Act, there would be no "other estate duty" in respect of a settled legacy except the

(1) [1916] 2 Ch. 391.

(2) *Ibid.* 444.

(3) 117 L. T. 422.

legacy duty already specially mentioned. Moreover, there was no reference to "payment" sufficient to suggest the time of payment as that at which the class of duties referred to was to be ascertained.

It has been suggested that the legacy in question stands on a special footing, and that, even if in the case of the other settled legacies the future estate duty is not payable out of the general estate of the testatrix, it is so payable in the case of the legacy in question. What is said is that, the testatrix apparently intended to substitute a net sum of 2500*l.* in reversion for a like sum in possession, and that this can only be effected by throwing the duty in question on her general estate, and therefore the will and codicil ought so to be construed. But with all respect, I think the answer is that this legacy, like the others, is made subject to the direction referred to above, that legacies are to be paid free of all death duties, and there would seem to be no reason for treating it in a manner different from that in which the other settled legacies are treated. The fact is, as the law stood at the date of the death, they would all have been net sums. It is the subsequent alteration of the law and not the execution of the codicil which affects the position of the legatees.

On the whole I am of opinion that the appeal fails as to estate duty, and must be dismissed on this point.

YOUNGER L.J. The order of the learned judge here deals with the incidence of legacy and estate duties payable in respect of three settled legacies on the death in each case of the tenant for life. The appeal, however, is concerned with the duties on one of these legacies only. The learned judge has in all three cases decided that the legacy and estate duties, which will be payable on the life-tenant's death, are payable out of the corpus of the legacy in question, and are not to be borne or charged upon the ultimate residuary estate of the testatrix. In so deciding he has felt himself at liberty to deal with the three legacies as if, on this question of duty, the same principles were applicable to each, and he finds that principle in the construction which on the analogy of

C.A.

1921

WEDGWOOD,
In re.

ALLEN

v.

PUBLIC
TRUSTEE.

Warrington L.J.

C. A. *In re Palmer* (1), assisted by other passages in and by the frame
 1921 of this will, he places upon the general clause therein
 WEDGWOOD, contained : the clause, namely, that all legacies and annuities
In re. given by the will or any codicil to it are to be paid free of
 ALLEN death duties. On the view he takes of that clause he has
v. held that all duties accruing in respect of a settled legacy,
 PUBLIC after it has been set apart, are not covered by the provisions
 TRUSTEE, of the clause, and are left to be borne by the legacy itself.
 Younger L.J.

Now there is, as I have said, an appeal only with regard to the duties which will become payable on the death of Katherine Lady Farrer in respect of the third of the legacies in question—that is, the settled legacy of 2500*l.* given by the testatrix's second codicil and in which Lady Farrer is interested as tenant for life. And a reference to the terms in which these legacies are given at once suggests the question whether there may not in relation to the incidence of duties on that legacy be considerations not applicable to the other two which have to do with something beyond the general exemption clause above mentioned on which the learned judge so entirely relied for his decision in all three cases. And a careful examination of the will and codicils indicates very clearly, to my mind, as I must confess, that, whatever may have been the case with regard to what I may call Miss Wedgwood's settled legacy, and in a lesser degree with regard to that of James Ingal Wedgwood—the two other legacies in question—the issue with regard to the duties upon that now under appeal depends really upon the words of exemption from duty contained in the gift of the legacy itself, and not, as I think, at all, upon the general clause referred to.

That this could not be said of Miss Wedgwood's settled legacy is very plain. There is in that case, in the gift of the legacy itself, no exemption whatever from duty. The general clause contains for that legacy the only exemption from duty to be found in the will. And, with reference to James's settled legacy, the distinction between it and that of Lady Farrer, while not so clear, nor of the same kind, is nevertheless notable in a relevant respect. In the case of

(1) [1916] 2 Ch. 391.

James's legacy, there is, unlike that of Miss Wedgwood's, a direction that it is to be paid "free of all death duties," but these words are found in the direction for payment to James himself, before the testatrix proceeds, as she subsequently does proceed, to engraft upon that absolute gift limitations both upon James's enjoyment of it and his interest in it. Phrasing it otherwise, the expressed exemption from death duties in the case of that legacy as in that of the equivalent gift to James's brother, with which it is, in the first instance, coupled, is made in relation to James himself, as distinguished from those subsequently introduced in succession to him. The reasoning, therefore, of the learned judge, although based upon the general exemption clause only, may possibly in the result be applicable to this particular exemption also as having an effect equivalent to that attributed by the learned judge of the general clause itself.

But so much cannot, as I think, be said of the third legacy with which we are now alone concerned; and holding that opinion, as I do, it will be convenient before making any examination into the effect in this will of the general clause upon those legacies which have their own words of exemption from duty to trace the history of this settled legacy as disclosed in the will and codicil with special reference to the words of exemption contained in the codicil in relation to it.

The genesis of the legacy as finally bequeathed appears clearly on the will and second codicil.

By her will the testatrix gave to the National Anti-Vivisection Society a pecuniary legacy of 5000*l.* to be paid, by virtue of the general clause above referred to, "free of all death duties." By her second codicil she reduces the legacy of 5000*l.* so bequeathed to one of 2500*l.*, and she directs "that my said will shall be read and have effect as if a legacy of 2500*l.* free of all death duties had been thereby bequeathed in lieu of the said legacy of 5000*l.*" The codicil then immediately proceeds as follows: "I bequeath free of all death duties to my trustees the sum of 2500*l.*" upon trust to invest and stand possessed of the said sum or investments and the

C. A.
1921
WEDGWOOD,
In re.
ALLEN
v.
PUBLIC
TRUSTEE.
Younger L.J.

C. A. annual income thereof "upon trust to pay the said income
 1921 to my sister Lady Katherine Euphemia Farrer during her
 WEDGWOOD, life without power of anticipation during any coverture, and
In re. after her death as to both capital and income in trust for the
 ALLEN said National Anti-Vivisection Society."

v.
 PUBLIC
 TRUSTEE.
 Younger L.J.

Now it is, to my mind, upon these provisions, not doubtful that the main purpose of the testatrix here in this codicil was to interpose with reference to one half of the society's original legacy of 5000*l.* a life interest in possession for her sister, the original interest in enjoyment by the society of that moiety being postponed until the sister's death. But that was also, as I read these provisions, the testatrix's sole purpose. The language used by her expressly exempting from all death duties, not only the second half but also the first, appears to me to import an anxiety on her part to preserve for the society an identical interest in the first half of the original legacy, and after her sister's death an undiminished interest in the second half and in the investments then representing that sum of 2500*l.* : in other words, while under the will the society took its 5000*l.* immediately, undiminished by any death duties, it was the testatrix's mind to place it by her codicil in the same ultimate position but by two instalments instead of one. In my judgment if the words of exemption from duty with which we have now to do can be fairly read in a sense leading to that result there is every encouragement from the context to induce a Court of construction so to read them.

This aspect of the case is in no way dealt with by the learned judge. He, as I have said, in deciding as he did with reference to all the three legacies was led to his conclusion as the result of a critical examination of the general clause of exemption and of that clause alone. His view was that the word "legacies" there refers to the total amount of a legacy given, and does not *prima facie* point to the successive interests carved out of it. He alludes also to the absence from the clause of such words as "enjoyment free of duty" as pointing in the same direction. From these indications, coupled with the fact that the residue is not settled, he is led to the

conclusion that the principle of *In re Palmer* (1) is really applicable to the general clause, and on that ground, and on that ground alone, he decides in the case of Lady Farrer's legacy as in that of the other two that the legacy and estate duties in respect of it payable on her death must be borne by the legacy itself.

C. A.
1921
WEDGWOOD,
In re.
ALLEN
v.
PUBLIC
TRUSTEE.
Younger L.J.

His conclusion therefore was reached without his dealing in any way with the special words of exemption applicable to that legacy alone—which at once raises the question whether in so determining this matter the learned judge has not relied, and that exclusively, on a clause which for this purpose is not the governing clause at all. And, very respectfully, I think that his judgment in relation to this legacy is open to that criticism.

Miss Wedgwood's will is not a very artistic document, but the scheme of it is reasonably plain. It contains before the general clause in question ten separate pecuniary legacies, some of large amount, as well as specific bequests in favour of her niece. One only of these legacies is expressly given free of death duties—that of 500*l.* to Charles Harold Herford if he should complete the life she was herself writing of her great grandfather Josiah Wedgwood.

Then we have the general clause already quoted, referable, it is true, to all legacies and annuities given by her will or any codicil and not only those before mentioned, referable also, I suppose, although it must be agreed very inaptly, to specific legacies. But it is the fact that every legacy thereafter given, whether in the will or in any codicil, is expressly given free of duties in terms which vary in detail of expression. These legacies include that now in question, and I should accordingly have thought that this was a will so framed as to lead very directly to the conclusion that the primary, if not the sole, function of this general clause was to exempt from duty according to its terms any legacy or annuity for which no specific or particular provision in that regard is elsewhere made. It may possibly also have the effect of giving all legacies and annuities its full benefit of exemption if in any

(1) [1916] 2 Ch. 391.

C. A.
1921
WEDGWOOD,
In re.
ALLEN
v.
PUBLIC
TRUSTEE.
Younger L.J.

case the particular words of exemption are less extensive. But, in my judgment, it cannot be read so as to restrict any special words of exemption in relation to any particular legacy, if, properly construed, these words give greater benefits to the legatee. To attribute that result to the general clause would be to strike the special words of benefit out of the will or codicil altogether, besides running counter to the well-established principle of construction "*Generalia specialibus non derogant*."

In my judgment, therefore, especially where on the analogy of *In re Palmer* (1) as applied to this rather haphazard clause, it is sought to confine the exemption thereby made to duties accrued at a particular moment of time, it is not permissible to limit by reference to that clause the duties on a legacy of which its own words of exemption cannot be restricted by the principle of that decision. I would here observe that *In re Palmer* (1) is no authority for so doing. In the will in that case there was nowhere any reference to exemption from duty except in the general clause itself.

Taking that view of the matter it is not necessary for me to express any opinion upon the question whether the general clause here is within the principle of *In re Palmer*. (1) I incline myself to the view of Swinfen Eady L.J. in *In re Parker* (2) to the effect that *In re Palmer* (1) was a decision on a special clause in a particular will, a will which had not, as will be agreed, many features in common with this will. But on this aspect of the case I confine myself to the observation that the direction to the testatrix's executors "to pay and *provide for* . . . the duties on all legacies and annuities bequeathed free of duties" hardly seems consistent with the view that it is in contemplation of this will that no duties are to be payable out of the estate on any settled legacy beyond those due at or before the moment when it is set aside which is the result of the learned judge's judgment.

I proceed now to ascertain, if I can, the effect of the special words of exemption attached to this legacy to Lady Farrer.

The words of gift and exemption are "I bequeath free of all

(1) [1916] 2 Ch. 391.

(2) 117 L. T. 422.

death duties to my trustees the sum of 2500*l.* upon trust," etc. Now first it is noticeable that the words "free of all death duties" come before the words "to my trustees" and not after these words. This is of some importance if the statement of Neville J. in *In re D'Oyly* (1) be correct, as I conceive every one will agree that it is. Dealing there with the words "free of duty," he said, "I do not see in this regard any distinction between a direction to pay the legacy to trustees for the legatee and a direct gift to the legatee. It seems to me that in either case the effect of the words used is identical." Other portions of this decision have been questioned, but not these words. In this view of the matter the position of the words of exemption is not without some significance. As they stand, if they are on this footing to have any real meaning at all, they are and can be made applicable only to the duties payable by the legatees for life and in remainder, and if by one of these then by both. In other words, the phrase, if it is to have effect, would put the case of this legacy entirely outside the principle of *In re Palmer*. (2)

And there is another aspect of the expression "free of all death duties" in which the authorities are of some value. What in relation to a settled legacy do they mean? Do they mean "free of all death duties arising only in consequence of my death," or do they mean "free of all duties arising by virtue of the dispositions made by this my will"? There has been some conflict of judicial opinion on this matter. Neville J. in *In re D'Oyly* (3) attached the first meaning to the words: Sargant J. in *In re Stoddart* (4) preferred the second. But the view of Sargant J. was, I think, definitely accepted by the Court of Appeal in *In re Parker*. (5) There Swinfen Eady L.J. held that such words mean "those duties which become payable in respect of dispositions made by my will": and Bankes L.J. in terms preferring the view of Sargant J. to that of Neville J. held that the words were the equivalent of "free from all duties arising by virtue of the

C. A.

1921

WEDGWOOD,
In re.

ALLEN

v.

PUBLIC
TRUSTEE.

Younger L.J.

(1) [1917] 1 Ch. 556, 559.

(3) [1917] 1 Ch. 556.

(2) [1916] 2 Ch. 391.

(4) [1916] 2 Ch. 444.

(5) 117 L. T. 422.

C. A. dispositions made by the will." That accordingly is the
1921 meaning which the highest available authority would lead us
WEDGWOOD, to place upon the words here, although I desire, speaking for
In re. myself, to say that that is the meaning which I should myself
ALLEN v. place upon them apart from all authority.

PUBLIC And this reasoning, if it be so far correct, disposes of the
TRUSTEE. whole case as decided by the learned judge. It shows that
Younger L.J. these words are in neither aspect of them capable of bearing
the construction placed by him upon what I have called the
general clause of exemption.

And further this reasoning, if it be correct, does dispose altogether of any case that can be made in favour of the learned judge's view that the legacy duty payable on Lady Farrer's death was, as well as the estate duty, chargeable against the legacy. It was not indeed seriously argued by Mr. Austen-Cartmell on behalf of the Attorney-General that it could be so charged: his position with reference to that duty being that while not disclaiming the learned judge's decision in his favour with reference to it, he did not seek to retain the benefit of the decision. Speaking for myself, however, I have difficulty in seeing how the learned judge's decision as to legacy duty does not, as much of his decision as to estate duty, necessarily follow from the principle of construction adopted by him. As the point, however, is now academic, I need not further elaborate the many further reasons there are for holding as I do, that that duty at least is chargeable against the residue.

The incidence of the estate duty which will become payable on Lady Farrer's death raises, however, a totally different set of questions, not yet resolved by anything I have said, as to the effect and application of the special words of exemption to the duties now in question.

The will of the testatrix was made on June 26, 1913; her second codicil on November 17, 1913; she died on the 26th of the same month—all before the passing of the Finance Act, 1914, which, putting it broadly, abolished the settlement estate duty, and imposed in lieu thereof at, in the present case, the death of Lady Farrer, a full estate duty on the 2500*l.*, treating that sum as property passing not on

the death of the testatrix, but on the death of Lady Farrer, the duty being measured, therefore, as to the percentage chargeable by the value of the total property then belonging to Lady Farrer or passing on her death and without any reference to the value of the testatrix's property at her death. The question that remains, therefore, is whether this duty, unknown to the testatrix, because not imposed while she lived, is included in the words "free of all death duties."

C. A.
1921
WEDGWOOD,
In re.
ALLEN
v.
PUBLIC
TRUSTEE.
Younger L.J.

Now first of all it has been held in quite a number of cases that such words or their equivalents are wide enough to include this duty in the case of a testator dying after the Act, and it has been so held by the Court of Appeal, where the will of such a testator although made after the statute was made in obvious ignorance that it had been passed. In other words, the fact that the amount of the duty is regulated by the value of an estate, which is not the estate of the testatrix, does not prevent the duty being covered by an exemption in this form. This was the view of Eve J. in *In re Snape* (1)—the legacy there being a trust legacy "free of all duty"—when he said that if the Act of 1914 had been law at the date of the will these words would have thrown the burden of the duty on the general estate. So in *In re Stoddart* (2) Sargant J. in the case even of a testator dying before the Act held that this death duty, although chargeable in respect of the estate of the tenant for life, was included in the words "free of all death duties," because it was a death duty which arose by virtue of a disposition made by the testator—that as I have already shown being the meaning properly attributable to these words.

To the same effect in this connection is the case of *In re Eve* (3), before Astbury J. In that case the will in question was made before the Act, and, therefore, when the testator was in ignorance of it. He died after the Act. It was held that the words "all bequests shall be free of duty" threw upon the residue the estate duty chargeable on the cesser of a life interest. In *In re Parker* (4), where the will was made on October 16, 1914, but in obvious ignorance of the passing of

(1) [1915] 2 Ch. 179, 184.

(2) [1916] 2 Ch. 444.

(3) [1917] 1 Ch. 562.

(4) 117 L. T. 422.

C. A. the Finance Act of that year—because the testator made
 1921 provision for payment of settlement estate duty thereby
 WEDGWOOD, abolished—the Court of Appeal holding that the expression
In re. “free from all death duties” has the meaning I have already
 ALLEN stated, decided also that the estate duty chargeable on the
v. cesser of a life interest was included in the exemption.
 PUBLIC TRUSTEE.

Younger L.J.

It seems to me, therefore, to be clear upon authority, that the words here would be wide enough to include this duty had its incidence been known to the testatrix, and wide enough in a proper case to include it even where, as here, it was not.

The present question comes down therefore to a very short one. Is this duty included here in the words of exemption which the testatrix has used ?

It is a future duty ; but on that point now *In re Palmer* (1) is express. “A testator,” says Lord Cozens-Hardy M.R. there, “may use language which is sufficient to cover a duty not in force at his death. . . . His intention must be found from the language of the will.”

Here the words are sufficient to cover this duty. What was the intention of the testatrix with regard to such a duty when she used these words ? Her intention, as I have already indicated, can be gathered, as I think, from the history of this legacy as already set forth. That history leads me to the conclusion that this is a case in which the testatrix did not contemplate by her words of exemption this duty or that duty. What she did intend was that this 2500*l.* on the death of Lady Farrer should be received by the Anti-Vivisection Society without any deductions whatever : cf. *In re Parker-Jervis*. (2)

Much, of course, was made of the difficulties of administration introduced by this consideration. These, I think, may easily be exaggerated. They are not in character different from similar difficulties of administration in relation to making provision for satisfaction of a testator's covenants under long leases and the like which constantly have to be solved. These difficulties, moreover, whatever they may be, have not

(1) [1916] 2 Ch. 391, 398.

(2) [1898] 2 Ch. 643, 653.

hitherto been allowed to stand in the way of that construction being placed upon an exemption of this kind, which the words of themselves are sufficient to cover. Nor has it been shown that in the present case these difficulties are at all serious.

For these reasons I am of opinion that both legacy duty and estate duty are covered by the words of exemption, and that a declaration to that effect ought to be made.

C. A.
1921
WEDGWOOD,
In re,
ALLEN
v.
PUBLIC
TRUSTEE.

Appeal allowed as to legacy duty and dismissed as to estate duty.

Solicitors for appellants: *Gerald & Arthur Marshall for Shield & Mackarness, Petersfield.*

Solicitor for Attorney-General: *Treasury Solicitor.*

W. I. C.

ERSKINE MACDONALD, LIMITED *v.* EYLES.

PETERSON
J.

[1920. E. 415.]

1920

Copyright—Agreement to give Publishers Offer of Authoress's "next three books"—Option to acquire Interest in Copyright—Next Novel sent to rival Firm—Breach of Agreement—Notice—Injunction—Copyright Act, 1911 (1 & 2 Geo. 5, c. 46), s. 1, sub-s. 2; s. 5, sub-ss. 2 and 3.

Nov. 30;
Dec. 1, 2, 3,
10.

The plaintiffs entered into a written agreement with the defendant, Mrs. E., an authoress, for the publication of a novel already written by her, and by the same agreement secured an option to publish her "next three books" upon certain royalty terms therein contained. The agreement provided that if they exercised their option in the case of any of her next three books, the plaintiffs were during the legal term of the copyright to have the exclusive right of producing and publishing the book within a defined area together with the entire control of the publication and terms of sale of the book, and also the right of suing in respect of infringement of copyright. The agreement also provided that Mrs. E. was not without the consent of the plaintiffs to publish, or allow to be published, any abridgment, translation or dramatised version of the book, and that on the determination of the agreement in certain events therein specified the right to print and publish the book was to revert to Mrs. E. who was then to be entitled to be registered as the proprietor thereof. In breach of this agreement Mrs. E. agreed with the defendants C. & Co., a rival firm of publishers, who had notice of the plaintiffs' agreement, to print and publish her next novel. In an action by the plaintiffs to restrain both defendants from publishing the

PETERSON
J.

1920

MACDONALD
v.

EYLES.

novel until it had been first submitted to the plaintiffs for their acceptance:—

Held, (1.) that the agreement was not a contract of personal service but was a contract by Mrs. E. to sell the products of her labour or industry, of which the Court would grant specific performance by restraining her from disposing of the novel in breach of her agreement with the plaintiffs.

Ward, Lock & Co. v. Long [1906] 2 Ch. 550 and *Printing and Numerical Registering Co. v. Sampson* (1875) L. R. 19 Eq. 462 applied.

(2.) that by virtue of their agreement and s. 1 of the Copyright Act, 1911, the plaintiffs would upon exercising their option in respect of any of the specified books thereby become equitable owners of a part of, or of an interest in, the copyright thereof, and that until they exercised it they had an option to become entitled to an interest in such copyright which option they were entitled to protect against Mrs. E. and also against C. & Co. who had notice of the plaintiffs' agreement.

De Mattos v. Gibson (1859) 4 De G. & J. 276 and *Falcke v. Gray* (1859) 4 Drew. 651 applied.

Barker v. Stickney [1919] 1 K. B. 121 distinguished.

WITNESS ACTION.

By an agreement in writing dated May 10, 1919, and made between the plaintiffs and the defendant Mrs. Margaret Leonora Eyles, an authoress, the plaintiffs agreed at their own risk and expense to produce and publish a novel written by her called "Margaret Protests," and to use their best endeavours to sell it. The agreement provided that the plaintiffs should during the legal term of the copyright have the exclusive right of producing and publishing the work in the United Kingdom, the Colonies, India and the United States of America, and should have the entire control of the publication and sale and the terms of sale of the book and that Mrs. Eyles should not during the continuance of the agreement, without the plaintiffs' consent, publish or allow to be published any abridgment, portion, translation or dramatised version of the work, and that the plaintiffs should pay to Mrs. Eyles certain specified royalties on the sales of the book.

Clause 4 (c) provided for the royalty payable to Mrs. Eyles in the event of the plaintiffs realizing profits from claims for infringement of copyright.

Clause 7 provided that if the plaintiffs should at the end of three years from the date of publication or at any time thereafter give notice to Mrs. Eyles that the demand for the work

had ceased or should for six months after the work was out of print decline or after giving notice neglect to publish a new edition or impression then in each of such cases the agreement should terminate and on the determination of the agreement in this or any other manner the right to print and publish the work should revert to Mrs. Eyles who should be entitled to be registered as the proprietor thereof.

PETERSON
J.
1920
MACDONALD
v.
EYLES.

By clause 10 Mrs. Eyles agreed to give to the plaintiffs "the offer of her next three books" on terms in respect of royalties specified in that and the following clause.

The plaintiffs published the book, which was favourably reviewed and attracted the attention of other publishers.

In November, 1919, the defendant, Mrs. Eyles, entered into an agreement with her co-defendants, Cassell & Co., Ltd., whereby the latter agreed to publish the next three novels which she might write after the completion of her agreement with the plaintiffs.

Mrs. Eyles sought to satisfy her obligations to the plaintiffs by sending them the manuscripts of a sociological book entitled "The English Harem," which she wrote after the agreement of May 10, 1919, a collection of short stories and a collection of verses, all of which she had already published. The plaintiffs alleged that none of these was long enough for publication as a book, or was a novel, or was a "next book" within the meaning of their agreement with Mrs. Eyles, and they refused to accept them as a fulfilment of her obligations thereunder.

Meanwhile Mrs. Eyles was writing her next novel which was eventually called "Captivity," and on February 3, 1920, the manuscript was received by Cassell & Co. who proceeded to set the book up in type and sent proofs of it to Mrs. Eyles.

In March, 1920, the plaintiffs learned that Cassell & Co. were about to publish the novel and they issued the writ in this action for an injunction restraining Mrs. Eyles from publishing or permitting or authorizing the publication of the book in question without first offering the same to the plaintiffs, and also for an injunction restraining Cassell & Co. from publishing or advertising that they were about to

PETERSON publish the said book or any other book written by her in breach of her agreement with the plaintiffs.

J.
1920

MACDONALD
v.

EYLES.
—

From the evidence at the trial of the action it appeared that Cassell & Co. had notice of the provisions of the plaintiffs' agreement and of the methods by which Mrs. Eyles proposed to satisfy her obligations thereunder.

The defendant, Mrs. Eyles, did not appear at the trial of the action either by counsel or in person.

Manning K.C. and *Farwell* for the plaintiffs. The plaintiffs' agreement gives them a right to publish Mrs. Eyles' next book: that is an equitable assignment of the copyright, and entitles them to specific performance of the contract. The authoress must submit the manuscript of her next book to the plaintiffs for them to see whether they will exercise the option given to them by their agreement and accept the book. The defendants, Cassell & Co., are threatening to deprive the plaintiffs of that right; they entered into their contract with notice of the plaintiffs' contract and subject to it and the plaintiffs are entitled to an injunction against them: *De Mattos v. Gibson*. (1) The three books which the defendant, Mrs. Eyles, sent the plaintiffs were not her next three books within the meaning of the contract, and we submit that the novel in question in this action was in fact her next book.

Hughes K.C. and *Macgillivray* for the defendants, Cassell & Co. Whether or not the Court will grant an injunction against Mrs. Eyles, we submit that this is not a case for an injunction against these defendants, between whom and the plaintiffs there is no contractual relationship, and mere notice of their contract is not sufficient. *De Mattos v. Gibson* (1) was an exceptional case dealing with a right of property and treating a charterparty on the analogy of leaseholds. It established no general principle. A contract as to the user of a chattel is not binding on a purchaser. The decisions in that case and in *Lumley v. Wagner* (2) are discussed in Fry on Specific Performance, paras. 855-862, where the

(1) 4 De G. & J. 276.

(2) (1852) 1 D. M. & G. 604.

learned author comes to the conclusion that the Court will consider whether the contract is or is not of a kind fit for specific performance and in the latter event will not grant an injunction. This is really a contract for personal service and is not of a kind fit for specific performance against Mrs. Eyles, and if not against her then a fortiori there is no case for an injunction against these defendants: *Whitwood Chemical Co. v. Hardman* (1); *Bagot Pneumatic Tyre Co. v. Clipper Pneumatic Tyre Co.* (2); *Barker v. Stickney.* (3) The present case is not so strong as the case of a chattel; the plaintiffs have only the right to have offered to them the option of printing and publishing Mrs. Eyles' next three books without any obligation on them to publish. The authoress remains owner of the copyright, and these defendants have no concern with her agreement with the plaintiffs. In *British Actors Film Co. v. Glover* (4) Lush J. held that there was a partial assignment of the copyright, within s. 5, sub-s. 2, of the Copyright Act, 1911, and not a licence, but in the present case Mrs. Eyles has given these defendants a mere licence to publish and with her consent, as the owner of the copyright, they have the manuscript and have set up the work in type and are proposing to publish it. Her agreement with the plaintiffs is really an agreement for personal service, or at most an agreement for an option to take a licence, in respect of which we submit that an injunction should not be granted against these defendants. The plaintiffs could have taken an assignment of future rights in Mrs. Eyles' next three books and acquired a good legal title: *Performing Rights Society v. Thompson* (5); but they have not done that, and an agreement to give an option cannot amount to an assignment.

Manning K.C. in reply. There may be a perfectly good assignment of the copyright in a work not yet published: *Ward, Lock & Co. v. Long.* (6) By the joint effect of their agreement and the provisions of s. 1, sub-s. 2 and s. 5, sub-ss. 2 and 3, of the Copyright Act, 1911, the plaintiffs became

(1) [1891] 2 Ch. 416.

(2) [1902] 1 Ch. 146.

(3) [1919] 1 K. B. 121.

(4) [1918] 1 K. B. 299.

(5) (1918) 34 Times L. R. 351.

(6) [1906] 2 Ch. 550.

PETERSON J.
 1920
 MACDONALD
 v.
 EYLES.

entitled to some of the rights of the owner of the copyright ; they have a claim to become owners of the copyright. There is nothing in law or against public policy in the assignment of a right in a chose in action not yet in existence : *Printing and Numerical Registering Co. v. Sampson* (1) ; and where damages would be insufficient relief the Court will enforce specific performance of a contract to purchase chattels : *Falcke v. Gray* (2) ; and that principle received statutory recognition in s. 52 of the Sale of Goods Act, 1893.

Under the Copyright Act of 1842, when copyright was one and indivisible, the decisions in *Stevens v. Benning* (3) and *Sweet v. Cater* (4) establish that, subject to the construction of the particular document under which the publishers derive their rights showing that they were intended to have the copyright, the publishers have such an interest in the work that they can come to the Court for its protection ; so in this case under the more liberal provisions of the Copyright Act, 1911, we submit that the plaintiffs are entitled to ask for protection. Under their agreement they have an inchoate right of printing and producing the work in question, which right the Court will protect against persons having an inferior title. *British Actors Film Co. v. Glover* (5) is in our favour. *Whitwood Chemical Co. v. Hardman* (6) was a case of personal service. The defendants, Cassell & Co., have no title whatever and are in a very different position from that of the successful defendants in *Bagot Pneumatic Tyre Co. v. Clipper Pneumatic Tyre Co.* (7) and *Barker v. Stickney*. (8)

We submit that the plaintiffs are entitled to an injunction against both defendants and to have the manuscript of the work in the same form as it was sent to Cassell & Co. submitted to the plaintiffs.

Cur. adv. vult.

Dec. 10. PETERSON J. stated the facts and continued :
 On April 14 the writ in this action was issued. At the trial

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|------------------------------------|-------------------------|
| (1) L. R. 19 Eq. 462. | (4) (1841) 11 Sim. 572. |
| (2) 4 Drew. 651. | (5) [1918] 1 K. B. 299. |
| (3) (1854) 1 K. & J. 168, affirmed | (6) [1891] 2 Ch. 416. |
| 6 D. M. & G. 223. | (7) [1902] 1 Ch. 146. |
| | (8) [1919] 1 K. B. 121. |

Mrs. Eyles did not appear by counsel or in person. That Mrs. Eyles was right in saying in her letter of November 28, 1919, to Mr. Flower, who was acting for Messrs. Cassell & Co., that the scheme which her literary agent had evolved and which she had adopted was not a "nice way" of treating the plaintiffs no one can doubt. She was conscious that she and the plaintiffs intended in clause 10 of the agreement of May 10, 1919, to refer to the next three novels which she should write, and that neither party contemplated that she would be at liberty to satisfy her obligations to the plaintiffs by collecting and offering to the plaintiffs a number of short stories or verses which she had already published in a variety of periodicals. Whether this scheme was honourable or dishonourable is not the question in this action. Mrs. Eyles had already expressed her view of it in phraseology which is less vigorous than that which I should use if I were called upon to say what I thought of the moral aspect of this part of the case.

PETERSON
J.
1920
MACDONALD
v.
EYLES.

Now the question is whether by offering these relics of her literary efforts in the past she has complied with her obligation to offer the plaintiffs "her next three books." Mrs. Eyles and her literary agent acted on the supposition that any compilation by Mrs. Eyles of literary material provided by her would if offered to the plaintiffs for the purpose of being published as a book satisfy the requirements of clause 10 of the agreement. In my opinion this is an erroneous view of the meaning of that clause. Clause 10 relates to work which Mrs. Eyles may produce after "Margaret Protests," and does not relate to past products. The words "her next three books" mean the first three books which she shall write after "Margaret Protests." It may be that the word "book" is not on the construction of this clause restricted to novels, that is a question which it is unnecessary for me to decide at present. It is sufficient for the purposes of this case to hold that whether the "English Harem" is or is not a book within clause 10, neither the compilation of published short stories nor the collection of published verses is such a book, and, therefore, that

PETERSON “Captivity” is one of Mrs. Eyles’ next three books within the true meaning of the clause.

J.
1920
MACDONALD
v.
EYLES.
—

But it was said that the plaintiffs’ attempt to enforce the provisions of clause 10 was an endeavour to obtain indirectly specific performance of a contract of personal service. This is not, in my opinion, a contract of personal service. It is a contract by Mrs. Eyles to hand over to the plaintiffs for a consideration the product of her labour; and I can see no difference in principle between this contract and a contract to transfer all future patents or improvements on an invention or a contract by a farmer for the sale of a future crop: see *Ward, Lock & Co. v. Long* (1) and *Printing and Numerical Registering Co. v. Sampson*. (2) They are not contracts to render personal service, but contracts to sell the products of the labour or industry of the contracting party. In my opinion the plaintiffs are entitled as against Mrs. Eyles to require Mrs. Eyles to hand to them the manuscript of “Captivity” in order that they may determine whether they will undertake the publication of it, and are entitled to an injunction restraining her from disposing of the book without regard to the provisions of clause 10.

The real contention in this case was that whatever remedy the plaintiffs might have against Mrs. Eyles they had none against Messrs. Cassell & Co., that they had no right to interfere in any way with the publication of “Captivity” by Messrs. Cassell & Co., and consequently that the only relief which the plaintiffs could obtain was compensation in damages by Mrs. Eyles for her breach of contract. It was contended that the agreement between the plaintiffs and Mrs. Eyles was in the nature of an agreement of employment under which the plaintiffs were employed to do work for Mrs. Eyles and that the plaintiffs did not obtain any interest in the copyright of “Margaret Protests” or any other book which they might publish under the agreement: see *Stevens v. Benning*. (3) If the plaintiffs are in equity the assigns of the copyright in whole or in part

(1) [1906] 2 Ch. 550.

(2) L. R. 19 Eq. 462.

(3) 1 K. & J. 168; 6 D. M. & G.

223.

then their rights do not rest upon a personal contract but are rights of property which they are entitled to protect : see *Sweet v. Cater.* (1)

It therefore becomes necessary to determine what rights the plaintiffs acquired under their agreement with Mrs. Eyles. Under that agreement they secured an option to publish Mrs. Eyles' next three books upon the royalty terms expressed in clause 10. But if they exercised their option in the case of any of these three books, the rest of the provisions of the agreement, so far as they are applicable, would apply to the book. Thus the plaintiffs would during the legal term of the copyright have the exclusive right of producing and publishing the work within the area defined by clause 3, and the entire control of the publication and the terms of sale of the book, and Mrs. Eyles would not without their consent be able to publish, or allow to be published, any abridgment, translation or dramatised version of the work. Clause 4 (c) indicates that the plaintiffs are to have the right of suing in respect of infringement of copyright. In any of the events contemplated by clause 7 the right to print and publish the work is to revert to Mrs. Eyles and it is provided that Mrs. Eyles shall be entitled to be registered as the proprietor thereof. It is true that under the Act of 1911 the register of copyrights is abolished, but the materiality of clause 7 is that it contemplates that it will, in the events referred to in it, be necessary to take some steps to revest the right of production and publication in Mrs. Eyles. Under the Act of 1911 "copyright" includes the sole right to produce or reproduce a work in any material form. In my opinion then by virtue of the provisions of the agreement and s. 1 of the Act, the plaintiffs if they exercise their option in respect of "Captivity" will have an interest in the copyright. Until they exercise their option they will not be assignees of the copyright wholly or partially, or grantees of an interest in the copyright by licence under s. 5, sub-s. 2 ; for it is only the exercise of their option that converts their option to become proprietors or owners of a part of the copyright into

PETERSON
J.
1920
MACDONALD
v.
EYLES.

PETERSON equitable ownership of part of the copyright or an interest
 J. in the copyright. But they have in the meantime an option
 1920 to become entitled to an interest in the copyright. Their
 MACDONALD interest has in the course of the case been called an inchoate
 v. interest, it is a right in the plaintiffs to acquire an interest
 EYLES. in the copyright by signifying their desire to do so, and is an
 interest in the copyright in the same way as an option to
 purchase a piece of land or to acquire certain shares is an
 interest in the land or shares.

It was contended that having regard to the fact that "Captivity" ought under clause 10 of the agreement of May 10, 1919, to be offered to the plaintiffs, it is not one of the three works which Messrs. Cassell & Co. have acquired the right to publish under the agreement; for it is not one of the three novels which Mrs. Eyles wrote next after the completion of the plaintiffs' agreement. But as between Messrs. Cassell & Co. and Mrs. Eyles, Mrs. Eyles having assured Messrs. Cassell & Co. that her obligations to the plaintiffs had been fulfilled and having sent the manuscript of "Captivity" to Messrs. Cassell & Co. for publication and induced them to expend money in setting it up in type, is estopped from saying that it is not a novel which comes within the provisions of her agreement with Messrs. Cassell & Co. It is clear that Messrs. Cassell & Co. had notice of the provisions of the plaintiffs' agreement and of the ineffectual methods by which Mrs. Eyles proposed to rid herself of her obligations under that agreement, and whatever may be their rights as against Mrs. Eyles they do not affect such rights or interests in the copyright as the plaintiffs may possess.

Reliance was placed by the plaintiffs on the well-known passage in Knight Bruce L.J.'s judgment in *De Mattos v. Gibson*. (1) The breadth of these observations has been criticised in later judgments: see *Barker v. Stickney* (2), per Scrutton L.J. But those criticisms do not, in my view, affect the present case. The point of Scrutton L.J.'s comments was that a person acquiring a chose in action, such as copyright, or chattels, or land, is not bound by mere notice of a

(1) 4 De G. & J. 276, 282.

(2) [1919] 1 K. B. 121, 132.

personal covenant by his predecessor; but those observations do not touch the right of a person who has acquired an interest in property to protect it against another who alleges that he has purchased the property from the common vendor. If in *Barker v. Stickney* (1) the royalties payable to the author had not rested upon a personal contract but had been charged upon the proceeds or produce of the copyright, so that the author had in this way an interest in the copyright which he was entitled to protect, the decision would have been in favour of the author: see *Bagot Pneumatic Tyre Co. v. Clipper Pneumatic Tyre Co.* (2) Thus in *Falcke v. Gray* (3) the plaintiff who had an option to purchase two choice jars of unusual beauty and rarity would have succeeded against the owner who granted him the option and a person who had subsequently purchased the jars from the owner with notice of the plaintiff's interest, if the option had not on other grounds appeared to the Court to be one which ought not to be enforced against the owner.

In my opinion, therefore, the plaintiffs have, by virtue of their option, an interest in the copyright of "Captivity" which they are entitled to protect against Mrs. Eyles and against Messrs. Cassell & Co.; and Mrs. Eyles and Messrs. Cassell & Co. respectively are not entitled to publish this book until it has been offered to and rejected by the plaintiffs.

Solicitors for plaintiffs: *Hutchison & Cuff*.

Solicitors for defendants, Cassell & Co.: *Field, Roscoe & Co.*

1) [1919] 1 K. B. 121.

(2) [1902] 1 Ch. 146.

(3) 4 Drew. 651.

P. O.
LAWRENCE
J.

BOWLER v. LOVEGROVE.

[1920. B. 3971.]

1921

Jan. 25, 26, *Restraint of Trade—Auctioneers and Estate Agents—Clerk—Contract of Service*
27;
Feb. 17. —*Restrictive Covenant—Uncertainty—Reasonableness—Competition.*

The plaintiff Bowler and his co-plaintiff Blake carried on in partnership the business of auctioneers and estate agents at Portsmouth and Gosport, and in May, 1920, the defendant entered their employment as an outside canvassing and negotiating clerk under a written agreement of service which provided (inter alia) that either party could terminate the employment on giving seven days' notice in writing and (clause 5) "after the termination from any cause of the employment aforesaid the clerk shall not for the term of one year carry on or be interested in carrying on the business of auctioneers and estate agents after such termination directly or indirectly assist as clerk manager or in any other capacity in the carrying on of such business within the borough of Portsmouth or in the town of Gosport" (*sic*). The duties of the defendant were to interview people and to obtain for the plaintiffs intending buyers or sellers, or intending lessors or lessees, of house property. In September, 1920, the plaintiffs duly terminated the defendant's employment, and on leaving their service he at once commenced business on his own account as an estate agent within the prohibited area, describing himself as "C. Lovegrove, A.A.I., Estate Agent," the initials A.A.I. meaning Associate of the Auctioneers' Institute, but he did not take out an auctioneer's licence nor do any business as an auctioneer:—

Held, that clause 5 on its true construction was not void for uncertainty, the intention of the parties being that the defendant should not after the termination of his employment carry on or be interested in carrying on the business of an auctioneer and estate agent within the prohibited area for one year.

But *held*, that the defendant, in carrying on the business of an estate agent only, had not committed a breach of the clause, nor had he by the use of the initials A.A.I. held himself out to be an auctioneer.

Held, also, on the evidence, that the clause being intended to prevent competition per se, was wider than was reasonably necessary for the protection of the plaintiff's business, and was therefore against public policy and not enforceable.

WITNESS ACTION.

The plaintiff Bowler carried on in partnership with his co-plaintiff Blake an extensive business as auctioneers and estate agents at Portsmouth (including Southsea) and at Gosport. Their business also included that of valuers, surveyors, accountants and insurance agents. They employed

some thirteen or fourteen clerks, some of whom were canvassing and negotiating clerks. The duties of the canvassing and negotiating clerks were to follow up intending purchasers or tenants (called applicants) who either came to the office to inquire whether the plaintiffs had any suitable properties to sell or to let, or who advertised their wants in this respect in the newspapers; to find out owners who were desirous of selling or letting their properties and to canvass such owners for instructions to sell or let, to place any suitable properties in respect of which they had obtained such instructions before applicants, and to canvass for offers from applicants and to submit any such offers to the owners; and finally to carry the negotiations right through or, in case of an owner desiring to sell by auction, to introduce such owner to the plaintiffs, leaving them to carry out the auction sale. The chief source of information upon which the canvassing and negotiating clerks relied in order to ascertain whom to canvass consisted of the local press. It was the habit of each such clerk every day to carefully scan all advertisements relating to properties offered for sale or lease and relating to properties required to be purchased or rented, and then to canvass the advertisers. If an applicant should happen to come to the plaintiffs' office without having been first canvassed, such one of the canvassing and negotiating clerks as happened to be in office would interview him, and thenceforth would treat that applicant as a customer obtained by him and would attend to his business throughout. If a canvassing and negotiating clerk succeeded in obtaining instructions from an owner to sell or let but did not himself know of any applicant for the property, he would place the particulars at the disposal of his fellow canvassing and negotiating clerks in case they should happen to be in touch with any applicant whom the property might suit. Whenever any applicant or owner called at the plaintiffs' office an entry was made by the counter clerk in a book, called "The Counter Book," of the name and address of the applicant or owner and of his requirements, and the canvassing and negotiating clerk who then interviewed him or who had previously canvassed him would

P. O
LAWRENCE
J.

1921

BOWLER
v.
LOVEGROVE.
—

P. O.
LAWRENCE
J.
1921
BOWLER
v.
LOVEGROVE.
—

put his initials against that entry so as to signify that such applicant or owner was to be treated as a customer obtained by him. If no canvassing or negotiating clerk should happen to be in the office when the applicant or owner called, it was the custom for the first canvassing and negotiating clerk who happened to return to the office after the entry of the call of such applicant or owner had been made in the counter book to put his initials against the entry and thereafter to follow up that applicant or owner and treat him as a customer obtained by him, provided that such applicant or owner had not been previously canvassed by another of the canvassing and negotiating clerks. It was also the duty of each canvassing and negotiating clerk to enter particulars of all properties, in respect of which he had obtained instructions to sell or let, in a book which was kept on the loose sheet system and was called "The Register." This register was open to the inspection of all the clerks and was naturally referred to frequently by the canvassing and negotiating clerks whenever they desired to see whether any properties suitable for their applicants were for disposal. The remuneration of each canvassing and negotiating clerk consisted of a fixed salary and a commission of 10% per cent. upon the profit derived by the plaintiffs in respect of any business introduced by him. If one clerk introduced the seller or lessor and another clerk introduced the buyer or tenant, it was the habit of the plaintiffs, if business resulted, to pay the full commission to each of the two clerks. The above method of business occasioned keen competition between the canvassing and negotiating clerks employed by the plaintiffs.

On May 8, 1920, the plaintiffs, having then already six canvassing and negotiating clerks, advertised for another in the Estate Gazette of that date. The defendant answered the advertisement, and an interview took place in London on May 15, 1920, between the plaintiff Blake and the defendant, when Mr. Blake, after explaining the duties the defendant would have to perform and the salary and commission he would receive, told the defendant that he would be required to sign an agreement containing a restrictive clause which

would bar him from competition either in Portsmouth or in Gosport for one year after leaving the plaintiffs' service. The defendant accepted the employment, entered on his duties on May 26, 1920, and on the following day signed an agreement of service which provided (amongst other things) that either party could terminate the employment by giving the other seven days' notice in writing and (clause 5): "After the termination from any cause of the employment aforesaid the clerk shall not for the term of one year carry on or be interested in carrying on the business of auctioneers and estate agents after such termination directly or indirectly assist as clerk manager or in any other capacity in the carrying on of such business within the borough of Portsmouth or in the town of Gosport."

P. O.
LAWRENCE
J.
1921
BOWLER
v.
LOVEGROVE.
—

In September, 1920, the plaintiffs, by a notice under the agreement, duly terminated the defendant's employment, and on leaving their service he at once commenced business on his own account as an estate agent at Southsea, which is in the borough of Portsmouth, and advertised himself as "C. Lovegrove, A.A.I., Estate Agent," A.A.I. meaning Associate of the Auctioneers' Institute, but he did not take out an auctioneer's licence nor did he do business as an auctioneer.

In October, 1920, the plaintiffs issued the writ in this action, and on motion for an interim injunction no order was made, the defendant undertaking to keep an account, and the trial of the action was expedited and now came on for hearing. The plaintiffs by their statement of claim alleged that the defendant was committing a breach of clause 5, and claimed an injunction to restrain him "from carrying on or being interested in carrying on the business of auctioneers and/or estate agents, and from directly or indirectly assisting as clerk manager or in any other capacity in the carrying on of such business at St. Augustine's Road Southsea or elsewhere within the borough of Portsmouth or in the town of Gosport for the term of one year from September 18, 1920." The defendant by his defence denied the alleged breach, and pleaded that clause 5 was (1.) void for uncertainty, (2.) wider

P.O. than was reasonable for the protection of the plaintiff's
LAWRENCE business, and (3.) against public policy.
J.

1921

BOWLER
v.
LOVEGROVE.
—

Owen Thompson K.C. and *Warwick Draper* for the plaintiffs.

In the first place, clause 5 is not void for uncertainty. It is badly drawn, but mere want of accuracy in the language does not render it nugatory. The Court will consider the clause as a whole and give effect, if possible, to the intention of the parties: *Haynes v. Doman*. (1) On its true construction the limit of time at the beginning and the limit of time at the end govern the whole clause, and if the word "or" is read in after the word "termination," where it occurs for the second time, the meaning of the clause is reasonably clear and does not offend against the rules as to time and space. Estate agency and auction sales form the most important branch of the plaintiffs' business, and the defendant in setting up within the prohibited area as an estate agent and holding himself out as an auctioneer by the use of the letters A.A.I., is committing a breach of the clause 5 which entitles the plaintiffs to an injunction in the terms asked for. If a profitable sale by auction were offered to him, he would probably at once take out an auctioneer's licence. Secondly, the clause is not wider than is reasonably necessary for the protection of the plaintiffs' business, and is valid and enforceable. The principles which govern agreements in restraint of trade are laid down in *Morris v. Saxelby* (2) and *Attwood v. Lamont* (3), where all the cases are considered. The onus is on the plaintiffs to prove reasonableness, and competition per se will not be restrained; but the Court will restrain competition where the employee has acquired confidential knowledge of his employer's trade connection and personal influence with the customers: *Morris v. Saxelby* (4); *Dewes v. Fitch*. (5) Here the duties of the defendant were such as enabled him to acquire confidential knowledge of their trade connection and personal influence with the customers, and that he carried

(1) [1899] 2 Ch. 13, 25.

(3) [1920] 3 K. B. 571.

(2) [1916] 1 A. C. 688, 707.

(4) [1916] 1 A. C. 688, 709.

(5) [1920] 2 Ch. 159, 170, 181.

away with him. The case really falls within the principle of *Dewes v. Fitch*. (1)

Jenkins K.C. and *G. E. Tyrrell* for the defendant. Clause 5 read literally is meaningless and unintelligible. But if the construction placed upon it by the plaintiffs be adopted, the prohibition against carrying on the business of auctioneers and estate agents must be construed strictly, and the defendant, in carrying on the business of an estate agent only, has not committed a breach of it. The letters A.A.I. do not assist the plaintiffs. There is no evidence that the defendant has held himself out in any way as an auctioneer or transacted any auctioneer's business. Further, the restriction is wider than necessary for the protection of the plaintiffs. It is admittedly intended to prevent competition and therefore, *prima facie* not enforceable : *Mason v. Provident Clothing and Supply Co.* (2) ; *Morris v. Saxelby* (3) ; *Attwood v. Lamont*. (4) The plaintiffs' business is entirely different to that of an ordinary trader. They have no regular customers, and the defendant whilst in their employ acquired no special knowledge. There is no question of trade secrets or of influence with particular customers.

[P. O. LAWRENCE J. referred to the judgment of Farwell L.J. in *Leng & Co. v. Andrews*. (5)]

That judgment is quoted with approval in *Morris v. Saxelby* (6), and shows that you cannot protect yourself against competition only. There is no evidence that the defendant carried away with him any confidential knowledge or that he has solicited any person who was a customer of the plaintiffs. The skill and knowledge he has acquired he is entitled to use for his own benefit.

Owen Thompson K.C. in reply. The true legal effect of the covenant is not merely to preclude competition, but also to protect the plaintiffs' trade connection : *Ropeways, Ltd. v. Hoyle*. (7)

P. O.
LAWRENCE
J.

1921
BOWLER
v.
LOVEGROVE.

(1) [1920] 2 Ch. 159, 170, 181.

(2) [1913] A. C. 724.

(3) [1916] 1 A. C. 688, 710.

(4) [1920] 3 K. B. 571, 579.

(5) [1909] 1 Ch. 763, 773.

(6) [1916] 1 A. C. 688, 704.

(7) (1919) 120 L. T. 538, 542.

P. O.
LAWRENCE
J.
1921
BOWLER
v.
LOVEGROVE.
—

Feb. 17. P. O. LAWRENCE J. The plaintiffs in this action seek to restrain the defendant from committing a breach of clause 5 of the agreement of May 27, 1920. The first question to be decided is what that clause really means. The clause is badly drawn, and it is obvious that some clerical error has been made either by the draftsman or by the copyist. Mr. Jenkins has argued that the whole of the clause, except the first sentence ending with the words "Estate Agents," is meaningless and ought to be rejected. I apprehend, however, that it is the duty of the Court to give a meaning to every part of the clause if that be possible. In the present case I have little doubt as to what the parties intended to express, and have come to the conclusion that Mr. Thompson's contention that the word "or" should be treated as inserted after the word "termination," where that word occurs for the second time, is well founded. It is true that by doing so the words "after such termination" are merely tautologous and otiose, but none the less I think that in supplying the word "or" as suggested I am giving effect to what the parties have expressed. Mr. Jenkins has further submitted that, on the assumption that the word "or" is supplied as suggested, the limit as to time only applies to the first branch of the clause and that the limit as to space only applies to the second branch of the clause. In my judgment neither of these submissions ought to prevail. I have come to the conclusion that upon the true construction of the clause both the limit as to time and the limit as to space apply to the whole clause, and that within those limits the defendant has agreed that he will not carry on or be interested in carrying on the business of auctioneers and estate agents, nor directly or indirectly assist as clerk, manager, or in any other capacity in the carrying on of such business.

The next question is whether, assuming that the clause is not void as being in undue restraint of trade, the defendant has committed or has threatened to commit a breach of it. The defendant's employment terminated on September 18, 1920, and he has since carried on, and claims the right to carry on, the business of an estate agent within the

prohibited area, but he has not carried on, or threatened to carry on, the business of an auctioneer. The prohibition in clause 5 is against carrying on the business of auctioneers and estate agents. Now it is admitted that the business of an auctioneer can be, and frequently is, carried on without at the same time carrying on the business of an estate agent, and vice versa, although it is very commonly found that the two businesses are combined. The question is whether clause 5 prohibits the defendant from carrying on not only the combined business of an auctioneer and estate agent, but also each of the separate businesses of an auctioneer and of an estate agent. On a literal construction of the clause only the combined business is prohibited. I have little doubt that if the plaintiffs had considered the question they would have expressed the clause in such words as to extend it to the carrying on of each of the businesses separately as well as to the combined business, but am I at liberty to extend the clause in this manner, considering that it is one which purports to restrict the defendant from exercising his calling? The question is not free from doubt. It is argued that by carrying on the business of an estate agent the defendant is carrying on a substantial part of the combined business of an auctioneer and estate agent, and is consequently committing a breach of his agreement. This argument, of course, involves the proposition that the defendant would be committing a breach of the clause if he were to carry on the business of an auctioneer without carrying on the business of an estate agent. It is to be observed, however, that the clause does not in terms extend to prohibit the carrying on of *any part* of the combined business, and, on the whole, I have come to the conclusion that the carrying on of the business of an estate agent is not a breach of the agreement not to carry on the business of auctioneers and estate agents. I am aware that this conclusion involves placing a very narrow and strict construction upon clause 5, but, in my opinion, the nature of the clause is such that it ought to be construed in the narrowest and strictest possible manner against the plaintiffs. But then it is said that the defendant by placing the initials "A.A.I." after his name

P. O.
LAWRENCE
J.

1921

BOWLER

v.
LOVEGROVE.

P. O.
LAWRENCE
J.
1921
BOWLER
v.
LOVEGROVE.

upon his name-plate, letter-paper, and business cards, is holding himself out as an auctioneer as well as an estate agent, and that if a tempting offer of an auction sale had presented itself he would have taken out an auctioneer's licence, and have conducted an auction sale. In my opinion, this contention is ill-founded. The initials "A.A.I." to the initiated mean that the defendant is an associate of the Institute of Auctioneers and Estate Agents. It has been clearly proved that an estate agent can become an associate of this Institute without being an auctioneer, and that, in fact, many estate agents who are not auctioneers are associates of this Institute. To the uninitiated I beg leave to doubt whether the initials "A.A.I." convey any meaning. On the evidence, I have come to the conclusion that the defendant has not held himself out as an auctioneer. As to the suggestion that the defendant would have conducted an auction sale if a favourable opportunity had presented itself, I am of opinion that this is not warranted by the evidence.

My conclusion that the defendant has not committed any breach of clause 5 is sufficient to dispose of this action in the defendant's favour. Having regard, however, to the elaborate arguments which have been addressed to me as to the validity of clause 5, and bearing in mind that I may be wrong in the view which I have taken of the construction of that clause, I consider it my duty to express my opinion upon the question of the validity of that clause. For the purpose of ascertaining the principles which are applicable to this part of the case I need not travel beyond the decision of the House of Lords in *Morris v. Saxelby* (1) and the decision of the Court of Appeal in *Attwood v. Lamont*. (2) These decisions show clearly that, as the present case is one between employer and employee, the clause is *prima facie* invalid, and that to establish its validity it is incumbent on the plaintiffs to prove that there existed some special circumstances which rendered it reasonably necessary for the protection of the plaintiffs' business. To ascertain whether the plaintiffs have discharged this onus it is necessary to state the relevant

(1) [1916] 1 A. C. 688.

(2) [1920] 3 K. B. 571.

facts. [His Lordship then stated the duties and method of business of the canvassing and negotiating clerks in the plaintiffs' employment as detailed above, and continued:] The defendant left the plaintiffs' employment on September 18, 1920, and shortly afterwards he began to carry on the business of an estate agent within the prohibited area. He now claims the right to continue such business, on the ground (amongst others) that the restrictive clause was not reasonably required for the protection of the plaintiffs' business and was merely inserted in the agreement to prevent him from competing with the plaintiffs. Mr. Blake has frankly admitted that clause 5 was inserted in the agreement with the object of preventing competition, and, moreover, he stated with the utmost candour that he thought and intended that the clause would prevent the defendant from carrying on all the various businesses which the plaintiffs were engaged in, including that of valuers, surveyors, accountants, and insurance agents. I have come to the conclusion on the evidence that the sole reason for the insertion of clause 5 was to prevent competition, and not because the plaintiffs had any real fear that (to adopt Lord Parker's language in *Morris v. Saxelby* (1)) the defendant could or would injure them by any *misuse* of his acquaintance with customers or of his knowledge of trade secrets, or that (to adopt Warrington L.J.'s language in *Dewes v. Fitch* (2)) the plaintiffs' trade connection would be *unduly* invaded by the defendant because of any special opportunities he might have acquired for that invasion while in their employ. I desire to emphasize the fact that Lord Parker used the word "*misuse*" and Warrington L.J. uses the words "*unduly* invade," because I cannot help thinking that the plaintiffs' counsel in arguing this case have treated the statements of those learned judges as if they had contained the words "use" and "invade" instead of the words "*misuse*" and "*unduly* invade." In this case, however (as in *Morris v. Saxelby* (3)), an attempt was made in argument to justify the restraint on the ground that it was no

P. O.
LAWRENCE
J.

1921

BOWLER
v.
LOVEGROVE.

(1) [1916] 1 A. C. 688, 710.

(2) [1920] 2 Ch. 159, 181-2.

(3) [1916] 1 A. C. 688.

P. O.
LAWRENCE
J.
1921
BOWLER
v.
LOVEGROVE.
—

more than adequate for the protection of the plaintiffs' trade connection—it is not suggested that the plaintiffs had any trade secrets which they desired to protect. In my opinion this attempt fails. It is true that the defendant came into personal contact with the plaintiffs' customers. But this fact loses its significance when the nature of the business carried on by the plaintiffs and the duties of the defendant in connection with such business are considered. The plaintiffs' customers with whom the defendant came into personal contact were not the ordinary recurring customers such as exist in most other businesses. Although Mr. Blake asserted that not all of the customers of the plaintiffs in their auctioneers' and estate agents' business were customers in respect of one isolated transaction only, and said that such of their customers as had more than one property to sell sometimes came again if the plaintiffs had effected a good sale for them, yet when pressed he could not remember the name of a single customer who had done so. Moreover the plaintiffs admitted that (as is usual in this class of business) persons in Portsmouth and Gosport who were desirous of selling or letting their properties generally placed such properties in the hands of other estate agents in Portsmouth besides the plaintiffs, and advertised them for sale in the newspapers, and that persons in Portsmouth and Gosport who were desirous of becoming purchasers or tenants of property went to other estate agents in Portsmouth besides the plaintiffs to see what they had on their registers, and also advertised their wants in the local newspapers. So that the wants of every customer were generally known in the locality, and such customer was open to be (and no doubt was in fact) canvassed by every estate agent in the district. The fact is that it is the essence of the plaintiffs' business of auctioneers and estate agents to obtain a perpetual succession of new customers by canvassing, and it was expressly for this purpose that the defendant and the other canvassing and negotiating clerks were employed. In these circumstances it is difficult to see what knowledge or information the defendant could have obtained in the course of

his employment which he could, if he had been so minded, have *misused* to the injury of the plaintiffs after he had left their employment. Any skill and efficiency in canvassing or negotiating and any knowledge of the locality which the defendant has acquired in the plaintiffs' service are his own to make use of, if he chooses, for competing with the plaintiffs. It was admitted by Mr. Blake that the only customers with whom the defendant came into personal contact were those whom he had through his own skill and industry discovered, or which under the system prevailing in the plaintiffs' office were treated as having been introduced by him, and it is clear that in each case such customers were customers for one particular transaction only, and would (with some rare exceptions) have to be canvassed again if at any subsequent time they would again want to make use of the services of an estate agent. If in such rare cases they should resort to the defendant in preference to the plaintiffs, this would only be because they were impressed with the personal skill and tact of the defendant and not because of his having been employed by the plaintiffs. Further, on ceasing to be employed, the defendant would no longer have access to the plaintiffs' books nor would he be able to obtain the information as to probable customers acquired by the other canvassing and negotiating clerks in the plaintiffs' employment; nor of course would he have the advantage of getting into touch with customers who came into the plaintiffs' office without having been canvassed. On his setting up in business as an auctioneer and estate agent on his own account his success would depend entirely upon his own skill and industry in obtaining new customers of his own and not upon making any improper use of the knowledge that he had acquired of the plaintiffs' trade connection. In truth the plaintiffs, whilst making the restriction appear most reasonable in point of time and space, knew that it would be effective to prevent competition because a person in the position of the defendant could ill afford to be out of business for a year, and they endeavoured not to preserve what they had got, but to obtain an advantage which the law does not allow.

P. O.
LAWRENCE
J.

1921

BOWLER
v.
LOVEGROVE.
—

P. O.
LAWRENCE
J.
1921
BOWLER
v.
LOVEGROVE.
—

If any special circumstances can be said to exist in this case which would warrant some kind of restraint being imposed on the defendant after leaving the plaintiffs' employment (which in my opinion is not the case), I think that such special circumstances would only justify a much more limited restraint than is to be found in clause 5—namely, a restraint strictly confined to prohibiting the defendant from canvassing any person who at the date when the defendant's employment ceased had to the knowledge of the defendant placed any property he had to sell or let exclusively in the hands of the plaintiffs, or who at that date had to the defendant's knowledge exclusively instructed the plaintiffs to find for him some property which he desired to buy or rent. But I think it extremely doubtful whether even such a limited restraint would in the circumstances of this case be justified, considering that the wants of most if not all of such persons would probably be known to every estate agent in the locality, every one of whom would consider himself at liberty to canvass such persons and try and satisfy their wants. Be that as it may, I hold that the facts proved in this case are not such as to establish the necessity of imposing a general restraint against trading in order to protect the plaintiffs against the possible misuse by the defendant of any knowledge he has acquired whilst in their service. To prevent the defendant from carrying on business of an auctioneer and estate agent altogether for however short a period is in my judgment a restraint far beyond anything that the plaintiffs can in the circumstances of this case justify as being reasonably required for the protection of their trade connection, always bearing in mind that they are not entitled to prevent the defendant from competing with them. In conclusion I will only add that the case of *Dewes v. Fitch* (1), which was so strongly relied upon by the plaintiffs, is in my opinion distinguishable from the present on the facts. I am of course bound by that decision in so far as it lays down any principles upon which the Court ought to act; but as was pointed out by Lord Parker in *Morris v. Saxelby* (2), it becomes necessary to consider

(1) [1920] 2 Ch. 159, 181.

(2) [1916] 1 A. C. 688, 708.

in each particular case what it is for which and what it is against which protection is required. This I have endeavoured to do in the present case. The action will be dismissed with costs.

P. O.
LAWRENCE
J.

1921

BOWLER

v.

LOVEGROVE

Solicitors: *Farlow & Hoare, for F. O. Goodman, Portsmouth;*
Mills & Morley, for J. R. C. Miller, Southsea.

H. L. F.

In re WELSH HOSPITAL (NETLEY) FUND.

P. O.
LAWRENCE
J.

THOMAS *v.* ATTORNEY-GENERAL.

1921

[1920. W. 1391.]

Jan. 13;
Feb. 22.

Charity—Hospital for sick and wounded Soldiers—Hospital closed—Surplus Assets—Resulting Trust—General charitable Intention—Cy-près.

On the outbreak of the war a hospital was erected at Netley, and equipped and run during the war, for the benefit of sick and wounded Welsh soldiers by means of large voluntary subscriptions raised in Wales. In 1919 the hospital was closed, the staff disbanded, and the property sold to the War Office, and after winding up the affairs of the hospital there was a surplus of some 9000*l.* :—

Held, on the evidence, that there was not a resulting trust of the surplus for the subscribers to the hospital, but a general charitable intention for sick and wounded Welshmen which enabled the Court to apply the fund *cy-près*.

In re British Red Cross Balkan Fund [1914] 2 Ch. 419 distinguished.

ADJOURNED SUMMONS.

In August, 1914, a committee was formed at Cardiff with the view of raising funds for the establishment of a Welsh hospital for Welsh soldiers wounded or suffering from illness during the late war and providing benefits and alleviations for them whilst in the hospital. The committee appealed to the public throughout the years 1914 to 1918 for subscriptions for the above purposes and very large sums were received, partly by subscriptions from private individuals, and partly by concerts, entertainments and street collections in the cities, towns and villages in Wales. With the funds so raised

P. O.
LAWRENCE
J.

1921

WELSH
HOSPITAL
(NETLEY)

FUND,
In re.

THOMAS
v.

ATTORNEY-
GENERAL.

the executive committee established and built a hospital at Netley known as the "Welsh Hospital (Netley)." The whole of the staff was appointed and paid by the committee out of the said funds, and the whole of the expenses entailed in the upkeep of the hospital were also paid out of the said funds.

On March 31, 1919, the hospital was closed, the staff was disbanded, and the hospital property and effects were disposed of to the War Office, and after discharging all the debts and liabilities of the hospital and of the committee there remained a surplus of about 9300*l.* in the hands of the trustees of the fund, which it was proposed should be applied in the foundation of scholarships for the encouragement of the study of medicine and surgery by persons of Welsh nationality in the University of Wales. No endowment for scholarships for the study of medicine and surgery existed in the University of Wales. The trustees were in favour of the above scheme and issued a summons to determine whether they could properly apply the surplus funds for that purpose or whether there was a resulting trust for the subscribers to the fund.

Owen Thompson K.C. and *W. J. Whittaker* for the plaintiffs. It is submitted that there was not a failure of the particular objects for which the subscriptions were obtained. There was a general charitable intention to benefit sick and wounded Welsh soldiers, and the fund can be applied *cy-près*. *Ironmongers' Co. v. Attorney-General* (1); *In re Campden Charities* (2); *In re Weir Hospital*. (3) The case of *In re British Red Cross Balkan Fund* (4) may be cited against us, but it is distinguishable. There the Attorney-General was not a party and the case was argued and decided on the footing that there was a resulting trust for the subscribers. The nearest decision to the present is *In re Princess Mary's Fund. Revelstoke v. Attorney-General*. (5) There a fund was formed in 1914 by subscriptions to send "Christmas presents from the whole nation to every sailor afloat and

(1) (1844) 10 Cl. & F. 908.

(3) [1910] 2 Ch. 124.

(2) (1881) 18 Ch. D. 310.

(4) [1914] 2 Ch. 419.

(5) Unreported.

every soldier at the front," and when the fund was closed there was a large balance in the hands of the trustees, and Peterson J. held that there was no resulting trust for subscribers, but that there was a general charitable intention which enabled the Court to direct that the balance might properly be applied cy-près in maintaining a maternity home for the wives and children of soldiers and sailors, and his Lordship distinguished *In re British Red Cross Balkan Fund* (1), because there it was admitted that the surplus belonged to some or all of the subscribers by way of resulting trust; and in the recent case of *In re Cotton Control Board's Levies Fund. Dickson v. Attorney-General* (2) very large surplus funds were in the hands of the Cotton Control Board, being accumulations representing levies imposed by the Board on cotton manufacturers and spinners during the years 1917 and 1918. The levies were used for the relief of operatives temporarily discharged from the mills as the result of the restrictions on output. Owing to the Armistice in November, 1918, the levies became unnecessary and were discontinued, and the Board, after discharging all liabilities, had in hand a surplus of 1,750,000*l.* The question then arose whether this surplus was properly applicable for charitable purposes cy-près to the original purposes for which the levies were made, or was subject to a resulting trust for the manufacturers and spinners by whom the levies were paid; and Russell J., on January 17, 1921, on a summons in chambers, held that the surplus was properly applicable to charitable purposes and sanctioned a trust deed for applying the surplus for the benefit of the cotton industry and the persons engaged in such industry.

A. Adams for the defendant Robinson, the chairman of the executive committee, supported the proposed scheme. The relief of suffering is always a charitable purpose. The inference here is that the donors intended to give their subscriptions out and out. The training of medical men of Welsh nationality is very desirable and within the purview of the charity, because the sick and wounded must have medical assistance.

(1) [1914] 2 Ch. 419.

(2) Unreported.

P. O.
LAWRENCE
J.

1921

WELSH
HOSPITAL
(NETLEY)
FUND,
In re.

THOMAS
v.

ATTORNEY-
GENERAL.

P. O.
LAWRENCE
J.

1921

WELSH
HOSPITAL
(NETLEY)
FUND,
In re.

THOMAS

v.

ATTORNEY-
GENERAL.

Danckwerts for the Attorney-General. It is submitted it was not intended that the hospital should come to an end at the close of the war. There was a general charitable intention: *Pease v. Pattinson* (1), and the fund should be applied *cy-près*, but the details of the proposed scheme have not been considered by the Attorney-General.

W. A. Greene for a subscriber. In this case there was no general charitable intention. The language of the appeals for subscriptions show that the charity was not of a permanent character, and that the money was asked for for a particular object and for a limited period. The particular object has failed and there is a resulting trust: *Tudor on Charities*, 4th ed., pp. 104-5; *Clark v. Taylor*. (2) In the *British Red Cross Case* (3) it was assumed that the Attorney-General had no interest, and it was admitted that there was a resulting trust. *Pease v. Pattinson* (1) is not against me. But if there was a general charitable intention, the proposed scheme does not carry out the original intention, which was to benefit sick and wounded Welsh soldiers, and the Court will formulate a scheme as near as possible to the original scheme: *Tudor on Charities*, 4th ed., pp. 199, 206 and cases there cited.

P. O. LAWRENCE J. In this case the question is whether the plaintiffs, who are the trustees of a fund raised during the war for the establishment and support of the Welsh Hospital at Netley, are at liberty to apply the surplus of such fund now in their hands for the purpose of founding scholarships in the University of Wales for the encouragement of the study of medicine and surgery by persons of Welsh nationality. In order to determine this question the Court must first of all ascertain whether the fund is devoted permanently to charity and can be applied under the doctrine of *cy-près*. This in turn depends upon what the Court ought in the circumstances to infer to have been the true intention of the subscribers to the fund when they made their contributions. The fund was started in September, 1914. On the first day

(1) (1886) 32 Ch. D. 154.

(2) (1853) 1 Drew. 642.

(3) [1914] 2 Ch. 419.

of that month the Lord Mayor of Cardiff issued an appeal to the inhabitants of Wales for subscriptions towards a Welsh hospital for service with the Expeditionary Force. The appeal shows that the first idea was that the hospital should be one serving with the Expeditionary Force at the Front in France. It also shows that six months' service in France was estimated to cost 15,000*l.*, and it continues: "But the sum subscribed is not limited to this amount, as further subscriptions can be used for prolonging the service or increasing the accommodation of the hospital," and it winds up with this expression: "We believe that Wales will rise to the full height of its responsibilities in this great national crisis, and by subscribing the necessary sum within a few days prove that it is foremost in seeking to relieve and comfort by the hands of their own fellow countrymen our sick and wounded across the seas." It is to be observed that the slip which was to be returned by the subscribers to the fund describes the object of the appeal as "The Welsh Hospital Movement." The appeal was responded to generously by the inhabitants of Wales, and from time to time further appeals were issued. Instead of the original scheme of providing a hospital for service with the Expeditionary Force in France, a hospital was established at Netley for the purpose of receiving and treating the sick and wounded Welsh soldiers who were sent from the battle front back to England. The hospital itself was built and fully equipped by November 3, 1914, and thenceforward was carried on wholly by means of voluntary subscriptions, except that for the last two years the staff was rationed by the War Office. Dealing with the further appeals that were issued, I need only call attention to those of the President and Chairman of the Executive Committee and the Honorary Treasurer of the Fund. They are headed "The Welsh Hospitals," and underneath that general heading is "The Welsh Hospital, Netley," and then "No. 34 (the Welsh General Hospital)," the latter being the unit at the Front with the Welsh Division. This unit was not maintained by the charity, but the charity contributed to comforts for the unit. The appeals contain statements showing what

P. O.
LAWRENCE
J.

1921

WELSH
HOSPITAL
(NETLEY)
FUND,
In re.

THOMAS
v.
ATTORNEY-
GENERAL.

P. O.
LAWRENCE
J.

1921

WELSH
HOSPITAL
(NETLEY)

FUND,

In re.

THOMAS

v.

ATTORNEY-
GENERAL.

had been done in the way of relieving the sick and wounded and how the funds had been applied, and ask for funds to enable the good work to be further continued. All the appeals are for the special object of relieving the sick and wounded Welshmen, inhabitants of Wales, who may arrive on these shores from the Front. That is the main and particular object of every appeal. The accounts of the fund show that in response to these appeals the large sum of 80,445*l.* 0*s.* 1*d.* was subscribed. The bulk of this sum was expended in building, equipping and maintaining the Welsh hospital at Netley, and a comparatively small portion was spent in providing comforts for the overseas unit. The hospital was closed down in March, 1919, the staff was disbanded, and the property was sold to the War Office. When the affairs of the hospital were finally wound up, it was found that there was a surplus of 9472*l.* 13*s.* 8*d.* The trustees of the fund having this surplus in their hands have come to the conclusion that it could best be applied in the foundation of scholarships for the encouragement of the study of medicine and surgery by persons of Welsh nationality at the University of Wales.

The first question to be determined is whether there is a resulting trust in favour of the subscribers to the fund. Mr. Greene has argued on behalf of the subscribers that there is a resulting trust for them, and that the surplus ought to be paid back to the various subscribers. All the other parties to the summons have argued that in the circumstances it must be inferred that there was a general charitable intent and that the Court is at liberty to apply the surplus *cy-près*. In my judgment this latter contention is well founded. The fund was created by contributions from various sources and in varying amounts, partly by donations from private individuals of more or less substantial amounts, and partly by the proceeds resulting from concerts and other entertainments given and from collections in streets and at churches made in most of the towns and villages of Wales. So far as regards the contributors to entertainments, street collections, etc., I have no hesitation in holding that they must be taken to have parted with their money out and out. It is inconceivable

that any person paying for a concert ticket or placing a coin in a collecting box presented to him in the street should have intended that any part of the money so contributed should be returned to him when the immediate object for which the concert was given or the collection made had come to an end. To draw such an inference would be absurd on the face of it. So far as regards individual subscribers of substantial amounts, the proper inference to be drawn is not quite so plain. In my opinion, however, these subscribers must be taken to have known that they were contributing to a general fund which was being raised in the manner I have described, and that their contributions would be aggregated with the proceeds of entertainments, street collections, etc., and would not in any way be ear-marked. They must, I think, also be taken to have known that the total funds collected from every source would be applied for the purpose of the charity without discriminating between the moneys derived from any particular source. In these circumstances I am of opinion that the true inference to be drawn is that these subscribers intended to part with their contributions out and out, and that they did not intend that the surplus, if any, of their contributions should be returned to them when the immediate object of the charity should have come to an end. In the result I hold that although all the contributions were in the first instance made for the particular purpose of building, equipping and maintaining the Welsh Hospital at Netley, the main underlying object of the contributors was to provide money for the comfort of sick and wounded Welshmen, and that all the subscribers intended to devote their contributions not only to the particular object, but generally to the benefit of their sick and wounded countrymen. That being so, the Court is, in my judgment, at liberty to apply the surplus of the fund *cy-près*. I am fortified in this opinion by the recent decisions of Peterson J. and Russell J. Peterson J. in *In re Princess Mary's Fund. Revelstoke v. Attorney-General* (1) came to the conclusion under analogous circumstances that there was a general

P. O.
LAWRENCE
J.

1921

WELSH
HOSPITAL
(NETLEY)
FUND,
In re.

THOMAS

v.

ATTORNEY-
GENERAL.

(1) Unreported.

P. O.
LAWRENCE
J.

1921

WELSH
HOSPITAL
(NETLEY)
FUND,
In re.

THOMAS
v.
ATTORNEY-
GENERAL.

charitable intent and that he had power to apply the surplus of a fund, which had been collected for the purpose of making Christmas presents to the troops, *cy-près*. Similarly Russell J. in *In re Cotton Control Board's Levies Fund. Dickson v. Attorney-General* (1) came to the conclusion that the very large surplus which there existed was applicable *cy-près* and sanctioned a scheme under which that fund was applied. Of course those cases, in so far as they turn on questions of fact, do not govern the present case, but in both of them the learned judges seem to have felt no difficulty in drawing the inference that the contributors had devoted their contributions to charity generally, although they were made for an immediate particular object which had come to an end. The case of *In re British Red Cross Balkan Fund* (2) to which my attention has been called is, in my judgment, distinguishable. It is not a decision on the point arising in this case. The fund in that case had been subscribed for the purpose of assisting the sick and wounded in the Balkan War. There was a large surplus, and it was admitted that the surplus belonged to some or all of the subscribers by way of resulting trust—whether that admission was one that was justified in the circumstances was not considered at all—and the only question for the Court to decide was how the surplus should be distributed amongst the subscribers. Therefore that case affords no assistance at all in coming to the determination whether or not the particular fund in this case, subscribed in the way I have described, is applicable *cy-près*.

The only other question is whether the particular application which the trustees desire to make of the funds in their hands is one which is justified under the doctrine of *cy-près*. It was argued by Mr. Adams that the suggested application was not a diversion from the particular object for which the fund was raised. I think there is great force in his argument that, if a fund is devoted to the benefit of sick and wounded, that benefit includes the training of persons whose duty it would be to attend to the sick and wounded.

(1) Unreported.

(2) [1914] 2 Ch. 419.

I do not agree with Mr. Greene's contention that the proposed application is so far removed from the immediate object for which the fund was intended as to prevent it from being an application under the doctrine of *cy-près*. The training of physicians and surgeons is, in my opinion, a benefit to the sick and wounded, as they must have proper attention. I think therefore that the proposed application does come under the general charitable intent which I hold to exist in this case. Notwithstanding this, however, it may well be that some other method of applying the fund may be found which is nearer to the immediate object for which it was raised. Mr. Greene has rightly pointed out that the fund might be advantageously applied for the benefit of sick and wounded Welshmen who are still suffering from the effects of the present war. Such an application would no doubt be nearer the object for which the fund was raised than the proposed application, but I have nothing before me to enable me to say whether it would be feasible or beneficial to apply the funds in such a manner. The fund is one which does not admit of any very large expenditure in any particular direction, and I think it is primarily for the Attorney-General, and for the trustees, to consider whether the proposed scheme of founding scholarships is or is not the best and nearest possible practicable purpose for which the fund can be applied. I will make a declaration that the fund is applicable *cy-près*, and I have no doubt that the Attorney-General will communicate with the War Office and others and endeavour to ascertain whether the fund can be advantageously applied to any such purposes as that suggested by Mr. Greene. But in saying this I do not desire in any way to throw cold water on the scheme that has been put forward.

Solicitors : *Wrentmore & Son, for Trevor Edward Harris, Cardiff; Treasury Solicitor.*

P. O.
LAWRENCE
J.
1921
WELSH
HOSPITAL
(NETLEY)
FUND,
In re.
THOMAS
v.
ATTORNEY-
GENERAL.

H. L. F.

C. A.

1921

Jan. 28.

GUNSTON v. WINOX, LIMITED.

[1920. G. 742.]

[1920. G. 976.]

Design—Copyright—Registration—Prior Publication—Disclosure to Trader to obtain Order—No Delivery before Registration—Invalidity of subsequent Registration—Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 55—Copyright Act, 1911 (1 & 2 Geo. 5, c. 46), s. 22.

Sect. 55 of the Patents and Designs Act, 1907, provides that the disclosure of a design by the proprietor to any other person, in such circumstances as would make it contrary to good faith for that other person to use or publish the design . . . shall not be deemed to be a publication of the design sufficient to invalidate the copyright thereof if registration thereof is obtained subsequently to the disclosure. Before registering a design the proprietors thereof submitted it to the Premier Drug Company, and obtained from them a large order for show cards embodying the design. The Drug Company knew of the intended registration, and before any of the show cards were delivered the design was registered by the proprietors. In an action by the proprietors to restrain an admitted infringement of the design by the defendants, Astbury J. held that the case fell within the section, so that the disclosure to the Drug Company was not a publication which invalidated the subsequent registration. He accordingly gave judgment for the plaintiffs. On appeal:—

Held, on the evidence, that the plaintiffs had not shown the existence of any circumstances which would make it contrary to good faith for the Drug Company to use or publish the design before registration. The registration, therefore, was invalid, and the defendants were entitled to judgment.

Decision of Astbury J. [1921] 1 Ch. 165 reversed.

APPEAL from the decision of Astbury J. (1) in two consolidated actions for infringement of the plaintiffs' registered design.

The plaintiffs were the proprietors of a registered design for a showcard for the advertisement of medicated wines. It consisted of a cardboard representation of a nurse holding a tray containing a bottle and glasses of medicated wine, cut out in such a shape as to fit on to a bottle standing upright. The design was ornamented with bunches of grapes and contained a panel for the name of the wine or manufacturer.

(1) [1921] 1 Ch. 165.

It was registered in Class 5 under the Patents and Designs Acts, 1907 and 1919 (7 Edw. 7, c. 29 ; 9 & 10 Geo. 5, c. 80). C. A. 1921

At the trial the infringement was admitted, the only defence being that the registration was invalid owing to prior publication. ^{GUNSTON} v. WINOX, LD

The prior publication relied on was as follows : In February, 1920, the plaintiffs, who had previously submitted their design in confidence to the defendants' sales and advertisement manager, but failed to obtain an order, sent the design to their Manchester agent, who submitted it to the Premier Drug Company as an advertisement show card for Liebig's Standard Wine.

The Drug Company approved of the design and on February 26 the plaintiffs submitted an estimate for 20,000 show cards.

On February 27 the Drug Company wrote accepting the estimate with a small variation in price and adding : " It is also to be understood that we have the copyright of this sketch, and, as arranged with your representative, you will have this done for us, and any small fees in connection therewith we are willing to pay."

On March 2 the plaintiffs wrote acceding to the variation in price and adding " We will write you on the matter of copyright shortly."

In April the plaintiffs ascertained that the defendants were reproducing their design. On April 8 they wrote them saying that the reproduction was clearly an infringement of the design.

On April 19 the plaintiffs commenced the first of these two actions basing it on breach of trust or confidence.

On April 24 the plaintiffs wrote to the Drug Company informing them thereof and adding " In the meantime we think it advisable to discontinue our work of reproduction pending the result of the case. We shall be glad to have your approval for so doing."

On May 5 the Drug Company replied agreeing to this suggestion, and no deliveries were in fact made.

Shortly after this a certificate of registration of the

C. A. plaintiffs' design in Class 5 "as of April 19" the date of the
1921 application was issued under the Patents and Designs Acts,
GUNSTON 1907 and 1919, and on May 20 a new writ was issued under
v. the Acts, and the actions were forthwith consolidated.
WINOX, LD.

On November 3, 1920, Astbury J. held that the disclosure of the design by the plaintiffs to the Drug Company was made in such circumstances as would make it "contrary to good faith" for the Drug Company "to use or publish the design" within s. 55 of the Patents and Designs Act, 1907. There had therefore been no publication, and the subsequent registration was valid, and the plaintiffs were entitled to an injunction.

The defendants appealed.

Micklem K.C. and *Vernon* for the appellants. The only question is whether the appellants have a defence on the ground that the design was published before registration. It is submitted that the offer of the design to the Drug Company for the purpose of getting an order was a publication. When once the order was given they were in a position to use the design or communicate it to any one they chose without any breach of faith whatever: *Blank v. Footman, Pretty & Co.* (1); *Hunt v. Stevens* (2); *Wingfield v. Snow* (3); *Edmunds and Bentwich on Designs*, 2nd ed., pp. 64, 235.

Luxmoore K.C. and *Swords* for the respondents. What happened between the respondents and the Drug Company is purely a question of fact. If the circumstances show, as it is submitted they do, that the Drug Company would have been guilty of a breach of faith if they disclosed the design to any one else, then there was no publication before registration.

The correspondence shows that it was part of the transaction that the Drug Company were to have the copyright in the design, and that being so it would have been a clear breach of faith if they had disclosed it to others and so

(1) (1888) 39 Ch. D. 678.

(2) [1878] W. N. 79.

(3) (1890) 8 R. P. C. 15.

prevented a valid registration from being obtained, with the result that the plaintiffs' property in the design would have been destroyed.

The respondents are protected by s. 55 of the Act.

[No reply was called for.]

C. A.

1921

GUNSTON

v.

WINOX, LD.

LORD STERNDALÉ M.R. I am sorry to say that I feel bound to differ from the learned judge in this case. I regret it because the defendants have played the plaintiffs a very dirty trick and if I could make them suffer for it I certainly would do so, but I am sorry to say that I think they escape by the terms of the Act. The case turns upon what are called, I think, "cut outs," which are used as show cards or advertisements. The particular design, called the "Nurse and Grapes" design, is intended to be attached to bottles for the advertisement of certain wines. The plaintiffs submitted the design to the defendants, who eventually did not give an order for it, but in the shabbiest way possible took the design and got it manufactured by somebody else. That was a clear infringement of the plaintiffs' right, assuming that there is no legal obstruction in the way. The obstacle alleged is this: that the plaintiffs had disclosed the design to another firm to whom they had showed it for the purpose of getting an order, and that, having regard to the Patents and Designs Act, 1907, the right to a design can only be obtained, according to s. 49 of the Act, if the design has not previously been published in the United Kingdom. Sect. 55 of the Act provides however that the disclosure of the design by the proprietor to any other person in such circumstances as would make it contrary to good faith for that other person to use or publish the design . . . shall not be deemed to be a publication sufficient to invalidate the copyright thereof, if registration thereof is obtained subsequently to the disclosure. I have left out the latter part of the section, although we have had some discussion upon it, because, in my opinion, it has nothing whatever to do with the question we have to discuss. It refers to what is called "The acceptance of a first and confidential order for goods bearing a new or original textile

C. A. design intended for registration," and in my opinion to
1921 bring it into the discussion of this case simply causes confusion.
GUNSTON There is ample authority that the showing of a design for the
v. purpose of getting an order is *prima facie* a disclosure of
WINOX, LD. that design. It was the law before the Act, and it is the
Lord Sterndale law now, as would appear from the section I have read ;
M.R. but if that showing to the other person be in circumstances
which would make it a breach of faith on his part to disclose
it, then that showing is not to be taken as a disclosure by the
proprietor. What happened in this case was this : After
the defendants had refused to give an order to the plaintiffs,
the plaintiffs sent the design to their traveller in Manchester,
who had been in communication with a firm called the Premier
Drug Company. He showed the design to the company and he
seems also to have promised that, if they gave him an order
for it, they should have the copyright in the design. Therefore,
the order once secured, I do not think the design was
considered by the plaintiffs as of very much value, but that
is immaterial. [His Lordship then read the letters of
February 26, 27, and March 2, between the Premier Drug
Company and the plaintiffs, and, after reading the final state-
ment of the plaintiffs in their letter of March 2, " We will
write you on the matter of copyright shortly," continued :]
That may mean either " We accept your order subject to this ;
that we have to negotiate further about the copyright " ;
or it may mean " We accept your order, copyright and all,
and we will write to you as to the matter you mention of
getting it done for you shortly." I do not think it matters
which it means. It is said that those letters imposed an
obligation upon the Premier Drug Company in good faith, not
to make any disclosure of this design to anybody else, because
they were to have the copyright, and they clearly con-
templated that in order to get the copyright there must be
registration, and if there were publication before registration
copyright could not be obtained ; and therefore that it was
contrary to good faith for them to disclose the design before
registration. If those were the facts, if I could agree, as
I wish I could, with the learned judge, that that was the

meaning of the letters, I should agree with his judgment, but I do not think it is so. I think the real facts as disclosed by these letters and some subsequent ones, to which I shall refer immediately, were that both parties thought that there was a copyright, and that they were bargaining for that copyright which existed. I have been rather shaken by the words of the Premier Drug Company in their letter of February 27 : " You will have this done for us " ; but it seems to me they may very well refer to getting the transfer of the copyright to them effected for them, and do not necessarily refer to registration. That they both of them thought that there was such a copyright, or at any rate that the plaintiffs thought so, seems to me quite clear from the two letters, one of April 8, in which the plaintiffs say that the defendants having the design reproduced was clearly an infringement of the plaintiffs' copyright. That clearly shows that the plaintiffs thought they had a present right in the copyright in this matter. But that seems to me to be more clearly shown by a letter of May 17 in which the plaintiffs' solicitors say : " The registration of the design, ' Nurse and Grapes Bottle Novelty,' under the Patents and Designs Act having now been completed, we shall be glad to know whether you will consent to the amendment of the writ of summons herein for the purpose of the plaintiffs claiming relief by virtue of such registration in addition to the relief already claimed." It seems therefore that what really was the case was this : Both parties, the plaintiffs and the Premier Drug Company, were under the impression that there was a copyright, and what was vaguely referred to as the thing to be " done for us " does not appear to me to be shown to be the registration, as the learned judge thinks it was, and therefore I think the result is that, both parties being under that impression, there was no obligation laid or intended to be laid upon the Premier Drug Company not to show anybody the design, or tell anybody anything about it. I believe there would have been difficulty in their showing it, because I think the pattern design was not left with them, but I do not think there was anything to show that it would have been a breach of faith on their part to have disclosed

C. A.
1921
GUNSTON
v.
WINOX, LD.
Lord Sterndale
M.R.

C. A. the design to somebody else. That being so there was, I regret
 1921 to say, no right in the plaintiffs, and, therefore, I think that
 GUNSTON the appeal must be allowed, but I certainly agree with what
 v. the learned judge said he would have done if he had been
 WINOX, LD. forced to come to that conclusion. I do not think we can
 Lord Sterndale possibly prevent the appellants having the costs of this appeal.
 M.R. I should like to do so if I could, but I see no power which
 enables us to do so, and I think the order, which the learned
 judge says he would have made—namely, that the plaintiffs
 should pay to the defendants the costs alone of the issue
 of publication, and that the defendants should pay to the
 plaintiffs the whole of the rest of the costs of the action—is a
 perfectly proper order, and is the order which should be made.

WARRINGTON L.J. I agree with the proposed order as to
 the costs of the action, and with reference to the merits
 of the case I also agree, but as we are differing from the learned
 judge I will just say a few words as to the grounds upon which
 I have arrived at my conclusion. The action in its present
 form is an action for an injunction restraining the infringement
 of copyright in a design. The title to copyright in a
 design depends entirely on registration, because the Copyright
 Act, 1911, contains the provision that that Act is not to apply
 to designs capable of being registered under the Patents
 and Designs Act, 1907. Therefore it is quite plain that the
 copyright in a design strictly speaking depends entirely
 upon registration under the Act of 1907. The Act of 1907
 provides by s. 49 that the controller may, on application
 by the proprietor of any new or original design not previously
 published in the United Kingdom, register the design. Therefore,
 if a design has been published prior to registration it cannot be
 registered, and copyright cannot be obtained. But there is some
 modification of that, which really only embodies what had
 previously been the law, so far, at any rate, as the provision
 which I am going to read is concerned, and that is contained
 in s. 55 (a). [His Lordship read the section and continued:]
 The sole question is whether the design was disclosed by the
 plaintiffs to the Premier Drug Company in such circumstances

as would make it contrary to good faith for the Premier Drug Company to use or publish the design. The design was disclosed to the Premier Drug Company for the purpose of obtaining from them an order for so many copies of it ; and it was disclosed to them by a representative of the plaintiffs, their Manchester traveller, to whom it had been entrusted for that purpose. In disclosing it the traveller produced an estimate for the cost of producing the required number, or at any rate obtained that estimate from his principal, and transmitted it to the Premier Drug Company. Then the Premier Drug Company dealt with that offer, including of course the estimate, in a letter of February 27, which the plaintiffs answered by their letter of March 2. [His Lordship read these letters and continued :] The next thing that happened was that the plaintiffs discovered what the Master of the Rolls has called, and I call, an exceedingly dirty trick on the part of the defendants ; that is, that they were making use of the plaintiffs' design, and therefore the plaintiffs wrote to them the letter of April 8. [His Lordship read the letter :] That letter clearly shows that the plaintiffs believed that they were entitled, at that moment, to the copyright in the design, and, but for the Copyright Act, 1911, they would have been entitled to the artistic copyright. There was nothing therefore very much out of the way in their not having realized that they were not entitled to that, but would obtain in substitution for it the copyright under the Act of 1907, which depends upon registration. Then, later, there is the letter of the plaintiffs' solicitors of May 17, which again indicates their view, and there is this further exceedingly remarkable bit of evidence on the same point, which is the writ that was issued on April 19, 1920, before registration, but on the same day on which they applied for registration, and there what they ask for is, amongst other things, a declaration that the manufacture by or to the order of the defendants and/or the publication by the defendants of copies of the same artistic design is an infringement of the plaintiffs' copyright therein, and then an injunction restraining them from manufacturing "copies of the same artistic work or design." All those

C. A.
1921
GUNSTON
v.
WINOX, LD.
Warrington L.J.

C. A. things indicate to me that the question of registering this
1921 thing as a design under the Act of 1907 had never occurred
GUNSTON to the plaintiffs at all, until no doubt it was pointed out to
v. them when the matter came to a pinch and it was necessary
WINOX, LD. to proceed by action to enforce what they considered their
Warrington L.J. rights. The learned judge has founded his judgment upon
this : that the parties must be taken to have been negotiating
on the footing that whoever was to be entitled to the copy-
right, whether the Premier Drug Company according to the
terms of their letter of February 27, or the plaintiffs if the
matter fell through, the right to obtain registration of the
copyright was contemplated by the parties and was reserved
as between them, and that therefore it would have been a
breach of good faith on the part of the Premier Drug
Company to do that which would have prevented registra-
tion of the copyright. That is where I differ from the learned
judge. To begin with, so far as I am personally con-
cerned, I think that the plaintiffs' letter of March 2,
accepting the suggestion of the Premier Drug Company
contained in their letter of February 27, was no acceptance
of their suggested term that the copyright should belong to
them, the Drug Company, and that the plaintiffs' further
statement in the letter of March 2 : " We will write you on
the matter of copyright shortly " was merely in effect
" We will write you again and tell you what we are going to
do with regard to carrying that stipulation into effect." I
think, therefore, there was a bargain that the purchasers
should have the copyright. If that is so then it cannot be a
breach of good faith on the part of these purchasers to do
that which would destroy, not the property of the plaintiffs,
but the property of themselves. But supposing I am wrong
in that view, and supposing that this was still all negotia-
tion, even then in my opinion, having regard to the letters to which
I have referred, and to the form of the writ, that negotia-
tion was proceeding on the footing that the plaintiffs were
already possessed of a copyright, and the only question was
whether that copyright, of which the plaintiffs were possessed,
was to be transferred to the purchasers or not. For these

reasons I confess, with extreme regret, I am bound to say that I think, having regard to the Act of Parliament, that the learned judge was not justified in granting the injunction which he did grant. The action, therefore, fails and the appeal must be allowed.

C. A.

1921

GUNSTON

v.

WINOX, LD.

YOUNGER L.J. I am of the same opinion. I differ from Astbury J. only because I read the correspondence between the plaintiffs and the Premier Drug Company in a sense different from that which the learned judge attributed to it. It appears to me that that correspondence coupled with some further facts to which I shall shortly allude is consistent only with the view held, I think, on both sides, but most certainly held by the plaintiffs (and that alone is material), that, the thing which in the correspondence is described as the copyright being a thing possessed by the plaintiffs, it was a term discussed in the negotiation between them and the Premier Drug Company relating to the order then given and taken for the supply of these designs, that the so-called copyright should belong to the Premier Drug Company. No one was to have any right to use this design except them. Whether in point of fact the correspondence amounted to an agreement to that effect I think it is unnecessary to decide, although if it were necessary to do so I should take upon the correspondence the same view as that just expressed by Warrington L.J. But it is, I think, unnecessary to decide that question for the purpose of determining this appeal. That the plaintiffs took that view of their rights with reference to this thing that they called copyright, and that they had no idea that their rights in respect of it depended on any future registration, is, I think, quite clear from what has since happened in relation to this matter. First of all the writ in the first action shows it. That shows that they regarded themselves as then having a right irrespective altogether of registration. The fact that they took an undertaking from the defendants in that action shows it. The complaint that was made in the letter of April 8 quite clearly shows it, and that therefore seems to me

C. A. 1921
GUNSTON
v.
WINOX, LD.
Younger L.J.

plainly to exclude from the correspondence between the plaintiffs and the Premier Drug Company the idea which is the basis of that correspondence as interpreted by Astbury J.—namely, that it was either assumed or agreed that, before publication and disclosure of their design took place, there should be a registration of the copyright in the design. I do not think that any such idea ever entered the minds of the plaintiffs, and if so it appears to follow as of course, or almost of course, that no obligation was intended by them to be imposed on the Premier Drug Company with regard to what I might call premature disclosure, when premature disclosure in the minds of plaintiffs presented no dangers at all. For these reasons I am of opinion that Astbury J.'s view of the correspondence is not that which, on a fair reading of it, is the true view, and, on that ground alone, and like the other members of the Court with regret, I differ from the conclusion at which he arrived.

Appeal allowed.

Solicitors for appellants : *Maitland, Peckham & Co.*

Solicitors for respondents : *Scatliffs.*

G. A. S.

In re ARAMAYO FRANCKE MINES, LIMITED.

[1920. A. 1017.]

C. A.
 1920
 RUSSELL
 J.
 July 28 ;
 Nov. 9.
 C. A.
 1921
 Jan. 24, 25.

War—Company—Declaration of Dividend—Conditions of Payment—Validity—Vesting Order—Right to receive Dividends—“Now due and to accrue due”—Debentures—Right to Interest and Capital—Trading with the Enemy Act, 1914 (4 & 5 Geo. 5, c. 87), s. 1, sub-ss. 1, 2—Trading with the Enemy Amendment Act, 1914 (5 Geo. 5, c. 12), s. 2, sub-ss. 1, 3—Trading with the Enemy Amendment Act, 1915 (5 & 6 Geo. 5, c. 79), s. 1, sub-ss. 1, 3—Trading with the Enemy Amendment Act, 1916 (5 & 6 Geo. 5, c. 105), s. 4.

By a vesting order made on August 24, 1916, under s. 4 of the Trading with the Enemy Amendment Act, 1916, it was ordered that the right to receive dividends “now due and to accrue due” on certain shares belonging to Germans in Germany of an English company should vest in the custodian under the Trading with the Enemy Amendment Act, 1914, and that he should be at liberty to transfer the shares into his own name. The shares were transferred on March 12, 1917. From time to time since the outbreak of war with Germany resolutions were passed by the directors declaring dividends, in each case subject to a condition that as regarded members of the company resident in Germany, Austria and Turkey the dividend should be payable only out of assets in Germany, and as regarded members resident elsewhere out of assets in England:—

Held, by Russell J., and the Court of Appeal, that the resolutions were valid as declarations of dividend but invalid so far as they imposed the condition.

On a claim by the custodian to be paid all the dividends it was proved that a shareholder had paid to himself out of assets in his power in Germany the amount of dividends declared on his shares:—

Held, as regarded dividends declared before the making of the vesting order, that the custodian was entitled to succeed in his claim—by Russell J. on the ground that, as it would have been illegal, under the Trading with the Enemy Act, 1914, for the company to pay the shareholder or authorize him to pay himself, the payment was no answer to the custodian’s claim, and, therefore, that under the words of the vesting order the custodian was entitled to all the dividends as “now due and to accrue due”—by the Court of Appeal, on the ground that the case fell within s. 2, sub-s. 1, of the Trading with the Enemy Amendment Act, 1914.

Held, also, by the Court of Appeal (Russell J. expressing no opinion on the point), that no acquiescence on the part of the custodian in the payment by the company of the German shareholders out of the German assets which would disentitle him to succeed in his claim had been proved.

Held, further, by Russell J. and the Court of Appeal as regarded the dividends paid after the making of the vesting order and the entry of

C. A.

1920

ARAMAYO
FRANCHE
MINES,
LD.,
In re.

the name of the custodian in the register of the company that there was no answer to the custodian's claim.

Debentures outstanding were not included in the vesting order:—

Held, by Russell J. and the Court of Appeal, that under s. 2, sub-s. 1, of the Trading with the Enemy Amendment Act, 1914, and s. 1, sub-s. 1, of the Trading with the Enemy Amendment Act, 1915, the custodian was entitled to the interest and any capital moneys which had become payable thereon since the outbreak of war.

SUMMONS.

Aramayo Francke Mines, Ltd., was an English company registered under the Companies Acts. Its articles, in common form, provided: "115. The profits of the company shall be divisible among the members holding ordinary shares in proportion to the amount of capital paid up on the ordinary shares held by them respectively." "117. The company in general meeting may declare a dividend to be paid to the members according to their rights and interests in the profits." "118. No larger dividend shall be declared than is recommended by the directors but the company in general meeting may declare a smaller dividend." "121. The directors may from time to time pay to the members on account of the next forthcoming dividend such interim dividends as in their judgment the position of the company justifies."

On August 24, 1916, a vesting order was made by the Board of Trade, under s. 4 of the Trading with the Enemy Amendment Act, 1916, by which, after reciting that certain shares in the company were property belonging to or held or managed for or on behalf of the persons whose names were set out and who were enemies within the Act, it was ordered that the right to transfer the shares and to receive any dividends "now due and to accrue due thereon" did vest in the Public Trustee as custodian, and that the custodian was to be at liberty to transfer the shares into his own name to be held by him as custodian. The shares in question were held by five shareholders, Germans in Germany. Pursuant to the vesting order the shares were transferred into the name of the custodian, who was entered upon the register as shareholder on March 12, 1917, and had since

so remained. From time to time after the outbreak of war on August 4, 1914, and both before and after the date of the vesting order, the directors passed resolutions declaring dividends on the shares in the company, in each case subject to the condition that, as regarded members of the company resident in Germany, Austria and Turkey, the dividend should be payable only out of assets of the company in Germany, and, as regarded members not resident in those countries, only out of assets in England.

The custodian took out this summons to have it determined that the resolutions, so far as they provided for payment only out of assets in Germany, were void as against him, and for a declaration that the company was liable out of any assets in its hands to pay to him the amounts of the dividends declared. He further asked for a declaration that the company was liable out of any assets in its hands to pay to him the amount of any capital and/or interest which had become due upon or in respect of certain debentures issued by the company.

An affidavit, exhibiting two receipts, was produced with a view to showing that some dividends declared before March 12, 1917, had been paid to the German shareholders.

The summons came on for hearing before Russell J. on July 28, 1920.

Clauson K.C. and *Austen-Cartmell* for the custodian. The resolutions were valid as declarations of dividend but invalid so far as they limited the shareholders to getting payment only out of particular assets. A company cannot make such a limitation. The custodian is entitled to the dividends under the vesting order, which gave him the right to receive dividends due at the date of the order or to accrue due. Apart from the order he is entitled under s. 2 of the Trading with the Enemy Amendment Act, 1914, so far as regards dividends declared before the order, and, as to dividends declared after the order, he is entitled as a shareholder on the register.

They also referred to ss. 4, 6 and 8 of the Act of 1914,

C. A.

1920

ARAMAYO
FRANCKE
MINES,
LD.,
In re.

C. A.
1920
ARAMAYO
FRANCKE
MINES,
LD.,
In re.

the Trading with the Enemy Amendment Act, 1915, s. 1, sub-ss. 1 (b), 3, and the Trading with the Enemy Amendment Act, 1916, ss. 4, 8.

Austen-Cartmell for the Board of Trade. If there is any insufficiency for payment of the dividends the Board does not wish to recover what has been paid to British shareholders. Originally the custodian only came in as the receiving hand under s. 2 of the Act of 1914. It was not until the Act of 1916 that the property became vested in him. The sinking of the steamship *Lusitania* led to a much more stringent policy than had previously been adopted against Germans and was the cause of the Act of 1916. The position of the custodian in respect of shares registered in his name is shown in *In re Pharaon et fils.* (1) When the vesting order is perfected by registration the custodian is shareholder to the fullest extent.

Sir J. Simon K.C., Manning K.C. and Edwardes Jones for the company. The resolutions are valid. If so, the custodian cannot support his claim, because there is nothing in the hands of the company which can be paid, nothing which, if there had been no war, the German shareholders could have come here and asked the company to pay. The company's answer would have been that the assets in Germany were the only fund they could look to. If a German shareholder had come to levy execution by attachment or garnishing a dividend declared in his favour, the only fund he could have attached would have been the assets in Germany. If the resolutions are valid, there was nothing on which s. 2 of the Act of 1914 could operate. On the other hand if the resolutions are invalid, the custodian cannot be paid under them. It is said they are valid as to part and invalid as to part. That is not intelligible.

[RUSSELL J. Treating the resolution as a whole and giving effect to every part of it, does the company say it is good or bad?]

Good.

[RUSSELL J. That astonishes me.]

(1) [1916] 1 Ch. 1.

The evidence is that some dividends have in fact been paid to German shareholders. *In re Ling & Duhr* (1) shows that a debt is not to be paid twice over.

[RUSSELL J. As to payments alleged to have been made prior to the vesting order, I must have further evidence.]

Then it is only a question now as to dividends declared after that order. It is difficult to see how after being placed upon the register the custodian was not entitled to the dividends afterwards declared.

RUSSELL J. [after stating the facts]. One of the questions before me is whether the resolutions are valid resolutions. In my opinion they are not in so far as they attach, or seek to attach, the conditions to the declaration of dividend. They are good in so far as they declare a dividend—"that an interim dividend of 6*d.* per share free of income tax be and is hereby declared." But what follows is, in my opinion, something which was beyond the power of the directors to attach to a resolution declaring dividends. They sought to attach the condition that the dividends should be as to one class of shareholders payable out of one set of assets and as to another set of shareholders out of another set of assets. That was a condition they had no power to make and, in my opinion, the resolution so far as it incorporates that provision is bad.

But it is said that with regard to some of the resolutions it may be that before the date of the vesting order or before the date when the custodian became a registered holder of the shares the dividend had already been satisfied by payment to a German shareholder, and that if that could be proved it would or might be a good answer to the custodian's claim in respect to dividends so paid or satisfied. [His Lordship considered the evidence but was not satisfied that any payment had been made.] However, it is stated that the company desires to prove exactly the dates at which payments were made, the manner in which they were made, and the persons by whom they were made,

C. A.

1920

ARAMAYO
FRANCKE
MINES,
LD.,
In re.

C. A.
1920
ARAMAYO
FRANCKE
MINES,
LD.,
In re.
Russell J.

and I have been asked to adjourn this matter in order to give an opportunity for evidence as to that to be given. I propose to do so. But that proof, if made out, is and could be no answer to the claim against the company for payment to the custodian of any dividend declared by resolution after March 12, 1917, when the custodian was entered on the register as shareholder. It would appear that there have been many dividends declared since that date beginning with May 14, 1917. It is obvious that no payment to the German shareholders—former German shareholders—of a dividend declared after March 12, 1917, could discharge the company from the obligation of paying the person who at the date was the shareholder registered—namely, the custodian—so, even assuming the company could prove proper payment to the original German shareholders of the amount of any dividends, no such payment in respect of dividends after that date would discharge the company's obligation. Accordingly I am deciding this case now as regards dividends declared on and after May 14, 1917. I hold, as to these, that the resolution, so far as it sought to impose a condition that German shareholders should be paid out of German assets, was an invalid resolution; but really that is not strictly necessary, because, if it were a valid resolution, it would be valid in all its parts and accordingly according to its tenour a shareholder at that date being a shareholder resident in England—namely, the custodian—would have been entitled to be, and ought to have been, paid his dividend *pari passu* with the rest of the shareholders resident here. I decide that the custodian is entitled to be paid the dividends declared on and subsequent to May 14, 1917.

The other point for determination is as regards the debentures. There has been no vesting order in relation to them, but, so far as any interest or principal money became payable to the debenture holders in respect of them, the company's duty was, under the Trading with the Enemy Amendment Act, 1914, and the Trading with the Enemy Amendment Act, 1915, to pay that interest and those principal moneys,

not to the Germans but to the custodian. Sect. 2, sub-s. 1, of the Act of 1914 provides: "Any sum which, had a state of war not existed, would have been payable and paid to or for the benefit of an enemy, by way of dividends, interest or share of profits, shall be paid by the person, firm or company by whom it would have been payable to the custodian to hold subject to the provisions of this Act and any Order in Council made thereunder." As regards principal moneys s. 1, sub-s. 1, of the Act of 1915 provides: "Section two of the Trading with the Enemy Amendment Act, 1914 (hereinafter referred to as the principal Act), which relates to the payment to the custodian of dividends, interest, and profits payable to or for the benefit of enemies, shall extend to sums which, had a state of war not existed, would have been payable and paid in the United Kingdom to enemies—(a) in respect of interest on securities issued by or on behalf of the Government or the Government of any of His Majesty's Dominions or any foreign Government, or by or on behalf of any corporation or any municipal or other authority whether within or without the United Kingdom; and (b) by way of payment off of any securities which have become payable on maturity or by being drawn for payment or otherwise, being such securities as aforesaid or securities issued by any company." By sub-s. 3, "for the purposes of this section 'securities' includes stock, shares, annuities, bonds, debentures or debenture stock or other obligations." It has been suggested by Sir J. Simon that s. 1 of the Act of 1915, so far as it extended s. 2 of the Act of 1914, only relates to principal money payable in the United Kingdom. I agree; but in default of any proof to the contrary I will assume that the debenture—I have not seen a copy of it—follows the ordinary form and provides for payment of principal moneys in this country. I cannot conceive that the debenture contained a provision to the contrary—namely, that the company must seek out the debenture holders wherever they may be and pay them. That being so, there is no answer, in my view, to the custodian's claim against the company for payment to him of

C. A.

1920

ARAMAYO
FRANCKE
MINES,
LD.,
In re.

Russell J.
—

C. A.
1920
ARAMAYO
FRANCKE
MINES,
LD.,
In re.
Russell J.

the interest payable since the commencement of the war and the principal moneys if any which would have been repayable under the debentures.

So to-day I simply declare that the company is liable to pay to the custodian the amount of the dividends declared on the shares comprised in the vesting order on and since May 14, 1917, and of any capital and interest which became due upon or in respect of the debentures since August 4, 1914. There will be an order accordingly.

Nov. 9. On the summons coming on again, an affidavit by a Mr. Michaelis-Braun was produced saying he was a Bolivian subject, but had since May, 1902, resided in Germany, and that he was a director of Aramayo Francke Mines, Ltd., from July 28, 1909, to December 2, 1915, when he ceased to be a director. It went on: "After the outbreak of hostilities on August 4, 1914, I deemed it my duty to do all that I could to safeguard the assets of the company in Germany, which consisted in part of a cash balance in the bank known as Staat Blafarbenlager, amounting to 5900*l.* or 118,135 marks, representing July, 1914, sales of bismuth and, in further part, of stocks and metals consigned to Germany from Bolivia for treatment prior to realisation. I deemed it right to set aside from the aforesaid funds and to pay to Ernst & Matilde Francke Stiftung"—which appeared to be a concern of which Mr. Braun was a director—"and to myself such dividends as became due to us in respect of our holdings of shares and such interest and principal moneys as became due to us in respect of our holdings of debentures. By means of notices in the newspapers and information from neutral countries I obtained knowledge of the dividends from time to time declared by the company, and I caused the payments to be made out of the assets of the company available in Germany, of which the particulars are set forth in the statement of account now produced and shown to me marked V. M. B. 1 in which the payment of the dividends and the payment of the interest and the principal moneys secured by the debentures appear

and I say that such payments are therein correctly stated and set forth."

C. A.

1920

ARAMAYO
FRANCKE
MINES,
LD.,
In re.

Clauson K.C. and *Austen-Cartmell* for the custodian. The question now is whether dividends declared between the outbreak of war on August 4, 1914, and March 12, 1917, when the custodian was entered on the register of shareholders have been paid to the German shareholders. If they have not, they are "dividends due and to accrue due" to the custodian under the vesting order and he is entitled to them. Upon the evidence they have not been effectively paid. It is a question of evidence.

Sir J. Simon K.C., *Manning K.C.* and *Edwardes Jones* for the company. Sect. 2 of the Amendment Act of 1914 does not give the custodian a right to sue for dividends. All he can do is to proceed for penalties under sub-s. 3. Where a liability, as that of the company here, is created by statute giving a particular remedy to enforce it, that remedy must be followed; *Wolverhampton New Waterworks Co. v. Hawkesford* (1); *Stevens v. Chown*. (2) Next, the question arises as to the effect of the vesting order on the position of shareholders who at its date had received the amount of their dividends. Younger J., when this case was before him (3), took an extraordinarily favourable view of the conduct of the company. *In re Maudslay, Sons & Field* (4) shows that Mr. Braun in paying himself out of money in Germany has done nothing inconsistent with his duty to his country. His act in paying himself was an administrative act done in execution of an "exceptional war measure" (Treaty of Peace, Art. 297, annex, para. 3)—of his own—and is binding.

Clauson K.C. The company had no power after the declaration of war to make payments to an enemy: Trading with the Enemy Proclamation No. 2 (1914, No. 1376). To do so was a misdemeanour: Trading with the Enemy Act, 1914, s. 1.

(1) (1859) 6 C. B. (N. S.) 336, 356.

(2) [1901] 1 Ch. 894, 903.

(3) [1917] 1 Ch. 451.

(4) [1900] 1 Ch. 602.

C. A.
1920
ARAMAYO
FRANCKE
MINES,
LD.,
In re.

RUSSELL J. This summons came before me on July 28 last, when I disposed of a considerable part of the summons. Certain matters, however, stood over in order to give an opportunity for further evidence to be filed. I considered the resolution and came to the conclusion—though I kept the point open in case any further argument on it was addressed to me—that the resolution, though good as a declaration of dividend, was wholly invalid and inoperative in so far as it sought to impose the condition that, as regards one class of shareholders, the dividend should be paid out of one section of the assets and, as regards another class, out of another section. A further argument has been addressed to me, and I only say I adhere to the opinion I expressed on the last occasion. I held that the custodian, having become a registered shareholder in March, 1917, there was, as regards dividends declared after that date, no answer to his claim against the company for payment of the amount of those dividends, and I made an order accordingly.

But there remained the question as to dividends declared between the date of the outbreak of war in August, 1914, and the date in March, 1917, when the custodian came on the register. The matter stood over, because it was suggested on behalf of the company that as regards dividends declared between those dates evidence could be produced to show that the shareholders had in fact been paid. If that were so, then, if the dividends had been properly and effectively paid by the company to the shareholders, the vesting order which gave the Public Trustee the right to receive any dividends due at the date of the order would be inoperative so far as concerns dividends not then due—by virtue of their having been paid to the shareholders—and so as regards any dividends to accrue due after the date of the vesting order but before the date of the custodian getting on the register as a shareholder. Some evidence was put before me on the last occasion, and I declined to treat it seriously; it was of a suspicious character. A further affidavit has now been filed. [His

Lordship read Mr. Braun's affidavit so far as set forth above.] On looking at the account and comparing it with the dividends which we know to have been declared between the date of the outbreak of war and the date of the dividend declared immediately before the Public Trustee became a registered shareholder (which are the dividends Nos. 28 to 37 inclusive), I find that in the case of each of those dividends Mr. Braun has in fact out of the assets of the company in Germany paid to himself and the Stiftung the amount of those dividends. In those circumstances the question is, Did the dividends cease to be due by reason of those payments? In other words, supposing the Stiftung or Mr. Braun had been minded to sue the company for the payment of those dividends over again, could the company have said, "You have already been paid, so that there is nothing due"? In order to determine that question it is necessary to look a little closely at what the state of affairs was as regards the company's power to give authority to Mr. Braun to make these payments in Germany. In my opinion, they could give him no such right. The position was this. Immediately on the outbreak of war a proclamation was issued prohibiting any payment to an enemy, so that the company itself could not make a payment to an enemy, nor could it authorize any one to make a payment to an enemy out of its funds. That proclamation was given, if necessary, statutory force by the first words of the Trading with the Enemy Act, 1914, which by s. 1, sub-s. 1, provides: "Any person who during the present war trades or has, since the fourth day of August, nineteen hundred and fourteen, traded with the enemy within the meaning of this Act shall be guilty of a misdemeanour," and sub-s. 2 provides: "For the purposes of this Act a person shall be deemed to have traded with the enemy if he has entered into any transaction or done any act which was, at the time of such transaction or act, prohibited by or under any proclamation issued by His Majesty dealing with trading with the enemy for the time being in force, or which at common law or by statute constitutes an offence of trading with the

C. A.

1920

ARAMAYO
FRANCKE
MINES,
LD.,
In re.

Russell J.
—

C. A.
1920
ARAMAYO
FRANCHE
MINES,
LD.,
In re.
Russell J.
—

enemy.” So it would have been illegal for the company to have authorized Mr. Braun to make any of these payments. That being so, if Mr. Braun and the Stiftung had been minded to sue the company for the amount of the dividend in ordinary times, the company might have affirmed the payment and said “ You have paid yourselves ”; but throughout all the time material to this case they could have done no such thing. They could not by any means have affirmed the payment to an enemy. The consequence of that is that throughout all the material times these dividends have never, and could never have, been paid by the company to the shareholders. All that has happened is that an individual has chosen to help himself out of certain funds belonging to the company that came within his power, but that in no way constitutes a payment by the company or by anybody authorized by the company on its behalf to make that payment to the shareholders. It was argued that, upon the construction of the Peace Treaty, this act of Braun in helping himself to the company’s moneys and applying them to his own benefit and that of the Stiftung was an act in pursuance of a war measure within the Treaty. I am always anxious to be patient with an argument, but I cannot see anything beyond a sense of humour which would justify that argument. The result is that these dividends were, within the meaning of the vesting order, “ dividends now due and to accrue due,” and accordingly, by reason of the title conferred upon the custodian by the vesting order, he was the only person entitled to receive payment of these dividends from the company, and he was the person and the only person to whom the company was entitled, and indeed was bound, to pay the dividends. I base my decision upon the words of the vesting order and upon the fact that these dividends were due and to accrue due within the meaning of that order.

It was also suggested that the custodian could claim these dividends by other means, that is to say, by virtue of s. 2 of the Trading with the Enemy Amendment Act, 1914. It was argued that that section, which enacts that the

company shall pay the dividends to the custodian, does not entitle him to recover them in civil proceedings such as the present, and that the only remedy within that Act for a breach of the section is to recover the pains and penalties imposed by sub-s. 3. That is a difficult and interesting point, but it is unnecessary in the present case to decide it. I base my decision upon the wording and effect of the vesting order, and upon the fact that these dividends have never been paid by the company or anyone authorized to pay them, and accordingly they are dividends due at the date of the vesting order and afterwards. The result is that I make an order, as I did on the previous occasion, for the payment by the company to the applicant of a sum that can be agreed.

A. L.

The company appealed. The appeal was heard on January 24, 25, 1921.

C. A.

1920

ARAMAYO
FRANCKE
MINES,
LD.,
In re.
Russell J.

Manning K.C. and *Edwardes Jones (Sir John Simon K.C.* with them) repeated the arguments used by them in the Court below. They further argued that as regarded the dividends declared and paid before the date of the vesting order the custodian had by his conduct in standing by and not taking any steps to prevent their payment to the German shareholders precluded himself from insisting on his right to be paid these dividends.

[The following cases in addition to those cited in the Court below were referred to: *Mitchell v. Egyptian Hotels, Ltd.* (1); *Nicol's Case.* (2)]

Clauson K.C. and *Gavin T. Simonds* for the custodian were called upon only as to the question of acquiescence. From the date of the vesting order, when the custodian became a registered shareholder of the company, there can be no question of acquiescence on his part. As to the period before the vesting order, the company must have known that the payment to the German shareholders was illegal, as it would affect the position at the end of the war. On the evidence it is

(1) [1915] A. C. 1022.

(2) (1885) 29 Ch. D. 421.

C. A.

C. A.
1921
ARAMAYO
FRANCKE
MINES,
LD.,
In re.

submitted there is no ground for inferring any acquiescence in such payment by the custodian. It would be outside his power to give up his claim to the dividends, and he cannot therefore be barred from setting up his present claim.

Manning K.C. in reply.

LORD STERNDALÉ M.R. I think this appeal from Russell J. must be dismissed. It raises a question as to the affairs of a company called the Aramayo Francke Mines, Ltd., which is whether the amount of certain dividends upon shares in the company, and of certain interest upon debentures in the company, are payable to the Public Trustee as custodian appointed under the Trading with the Enemy Acts. The company is an English company registered in 1906 and carries on business, chiefly mining business, in Bolivia, where it produces considerable quantities of bismuth and wolfram, which before the war were chiefly sent to Germany to be treated. The company had considerable assets in Germany at and after the beginning of the war. On November 14, 1916, an order was made under the Trading with the Enemy Amendment Act, 1914, appointing a controller of the company, but leaving the management in the hands of the directors: see [1917] 1 Ch. 451. In 1917 a local board of directors in Bolivia was appointed under new articles passed in that year, and after that date everything connected with the declaration and payment of dividends was done by the Bolivian board. There were shareholders in Germany, and other countries at war with Great Britain—Turkey and Austria. The articles governing the distribution of dividends are arts. 115, 117, 118, and 121, and the result of them is that the directors may declare interim dividends, and the directors may recommend final dividends, but the company must declare them. Being an English company the dividends would naturally be payable in English sterling, and would be payable at the addresses of the shareholders which were in possession of the company.

The matters with which we have to deal divide themselves into two periods, the period after the vesting order was made,

and the subsequent entry of the Public Trustee as custodian upon the register as shareholder and the period before that. With regard to the period after the vesting order and the entry of the Public Trustee upon the register it seems to me, for reasons to which I shall afterwards refer, that there is really nothing to be said. There are many reasons why this application must succeed with regard to that period.

With regard to the period before the vesting order the matter is different, and no doubt more difficult. The order deals with dividends which were paid after February 1, 1915. In an account that was put in there is one dividend before that date, but the order does not deal with it, and therefore we have only to deal with dividends from February 1, 1915. At the time when the dividend was paid the Trading with the Enemy Amendment Act, 1914, was in existence. That Act by s. 2, sub-s. 1, provides: "Any sum which, had a state of war not existed, would have been payable and paid to or for the benefit of an enemy, by way of dividends, interest or share of profits, shall be paid by the person, firm or company by whom it would have been payable to the custodian to hold subject to the provisions of this Act and any Order in Council made thereunder." It also provides in sub-s. 3: "If any person fails to make or require the making of any payment or to furnish the prescribed particulars within the time mentioned in this section, he shall, on conviction under the Summary Jurisdiction Acts, be liable to" certain heavy penalties which I need not enumerate. In order to get over the difficulties arising from the fact of some of their shareholders being in Great Britain, and others being in enemy countries, and from the fact of their assets being partly in Great Britain and partly in enemy countries, the directors on February 1, 1915, passed a resolution in effect declaring an interim dividend upon shares, and adding to that declaration the conditions that as regarded members of the company resident in enemy countries the dividend should be payable only out of the assets of the company in Germany, and that as regarded members resident in England such dividend should be payable

C. A.

1921

ARAMAYO
FRANCKE
MINES,
LD.,
In re.

Lord Sterndale
M.R.

C. A.
1921
ARAMAYO
FRANCKE
MINES,
LD.,
In re.
—
Lord Sterndale
M.R.
—

only out of the assets of the company in England. It appears that with regard to two of the largest blocks of shares with which we are concerned in this case a certain gentleman of the name of Michaelis-Braun has paid himself, and also a charitable institution which held shares in the company and of which he is director, the amount of the dividend declared out of assets which were in his hands, or under his control in Germany. The contention of the company is that in those circumstances they cannot now be asked to pay those dividends to the custodian.

The first point is, does this case come within sub-s. 1 of s. 2 of the Trading with the Enemy Amendment Act, 1914, and if it does, does that sub-section give the custodian a right to claim the money in this form? If the case comes within the sub-section, and the sub-section gives him that right, then, subject to a question of acquiescence, with which I shall deal directly, the fact that the German shareholders, or some of them (we have no evidence as to the others), have paid themselves out of the assets under their control in Germany is no answer to this application. It seems to me that the case clearly comes within this sub-section. The sum claimed is a sum which "would have been payable and paid to or for the benefit of the enemy by way of dividends, interest or share of profits." In my opinion that is so whether the sum refers to the dividends on the shares I have mentioned, or to the interest on the debentures. The capital sums that have been paid off in respect of the debentures are brought within the operation of this sub-section by the Trading with the Enemy Amendment Act, 1915.

But the objection taken to the recovery of the money under this sub-section is this. It is said that this case comes within the principle, that where a new obligation is created by statute, and a means of enforcing that obligation is thereby given, the only means of enforcing that obligation which can be adopted is that provided by the statute, and consequently that no action like the present will lie to recover the money. In fact, the case is said to come within what Willes J. in his well-known judgment in *Wolverhampton New Waterworks Co.*

v. *Hawkesford* (1) calls the third class of cases of statutory liability: "There is a third class, namely, where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it. The present case falls within this latter class, if any liability at all exists. The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class."

In my opinion the argument is not well founded, and for two reasons: in the first place I do not think that a new obligation is here created at all. The obligation lay upon the directors of the company and upon the company to pay dividends to their shareholders. What is done by this statute is simply to alter the payee of the dividends, to say to the directors and the company that instead of performing the obligation by paying the dividends to those persons who are enemies, they shall perform it by paying them to the custodian, and therefore it does not create a new obligation at all. Then it also seems to me that sub-s. 3 does not provide a method of enforcing the obligation. It provides penalties for not fulfilling it, but it does not provide a method of enforcing it. On that point I am not quite so clear as I am on the first. But it seems to me that the contention is absolutely answered by the fact that the statute creates no new obligation, and that all that it does is, as I have said, to alter the payee and to transfer the obligation from one person to another, leaving to transferee the same remedies for non-fulfilment of the obligation as the original payee had.

That seems to me to be a short and simple answer to the objection, subject to the question of acquiescence with regard to the period before the vesting order was made. It would apply also to that period after the vesting order was made.

But it is contended that even if that be so, the Public Trustee, as custodian, has by his conduct precluded himself from insisting upon his right by his acquiescence in the payment to the enemy shareholders of their dividends out of the assets in Germany. We are told by the learned counsel that

C. A.

1921

ARAMAYO
FRANCKE
MINES,
LD.,
In re.

Lord Sterndale
M.B.

C. A.
1921
ARAMAYO
FRANCKE
MINES,
LD.,
In re.
Lord Sterndale
M.R.

this point was taken before the learned judge, and I do not for the moment doubt it, but I feel fairly satisfied that it was not taken as a very important one. It is not dealt with by the learned judge in his judgment, and I doubt whether it was very much more than mentioned, but at any rate it is a point which, subject to any question of fact in evidence, may be taken before us. I think, however, it fails for the simple reason that in my opinion there is not the slightest evidence that the company, in what they did, in any way acted upon, or were influenced by, the conduct of the Public Trustee, as custodian. They passed the resolution which I have mentioned, and they wrote to the custodian informing him that they had done so, and asking whether there would be any objection to it. The custodian replied that the matter was one for the Controller of the Companies Department of the Board of Trade, and thereupon the company applied to the Board of Trade, and the Board of Trade informed them that after careful consideration, as at present advised, they were of opinion that such a resolution was not one which could properly be acted upon. The company was therefore told quite distinctly that it was not a matter for the custodian to decide, but for the Board of Trade; and that the Board of Trade considered the resolution was one which could not be acted upon. They, however, continued to act upon it, and on March 3, 1915, they informed the Public Trustee that the following resolution had been passed at a board meeting: "Resolved that an interim dividend of 6*d.* per share free of income tax be and is hereby declared subject to and upon the conditions following, namely, 1, That such dividend be payable on the 1st day of February, 1915. 2, That as regards the members of the company resident in Germany, Austria and Turkey, such dividend be payable only out of the assets of the company in Germany. 3, That as regards members not resident in the above mentioned countries such dividend be payable only out of the assets of the company in England." The company, therefore, acted upon that resolution with the full knowledge that the Board of Trade were of opinion that it could not be acted upon. Of course that resolution may

have three meanings; it may be valid or invalid in three respects. It may be valid both as to the declaration of dividend, and also as to the conditions; it may be valid as to the declaration of the dividend, but invalid as to the conditions; or it may be invalid altogether, so that there is no declaration of dividend at all. The learned judge has held that the second is the proper construction to be put upon this resolution, and I think he is right. It seems to me that when the company declared the dividend they were acting entirely within their powers; when they annexed these conditions they were acting outside their powers and were attempting to limit the effect of the declaration of dividend in a manner in which they were not entitled to do. That, as I say, they did without any suggestion, or possibility of suggestion, of acquiescence on the part of anyone at all. They consulted the Board of Trade and obtained their opinion, and then acted diametrically in opposition to it. After that other correspondence followed, and the letter which is perhaps of the most importance was written on June 3 by the representative of the Public Trustee to this effect: "In answer to your letter of the 29th ultimo, I am directed by the Public Trustee to say that the scheme for purchasing the enemy owned shares in your company is not one which he is able to deal with at the present time, pending a decision of the Board of Trade. I am to draw your attention to the fact that no interest has been paid to the custodian in respect of the debentures held by enemies, and it would appear that this interest is not covered by the resolution passed by your board in February, 1915." That does look very much as if the gentleman who wrote that letter was not taking any objection to that resolution. I think, as the learned counsel for the respondents admitted, there can be no question that the Public Trustee's office might, and, but for pressure of business at that time, ought to have acted more promptly in this matter in the enforcement of the payment of the dividends. But then there was further correspondence and a scheme was suggested by which the shares of these enemy shareholders should be bought out. Again when the Public

C. A.

1921

ARAMAYO

FRANCHE

MINES,

LD.,

In re.

Lord Sterndale

M.R.

C. A.

1921

ARAMAYO
FRANCKE

MINES,

LD.,

In re.

Lord Sterndale

M.R.

Trustee as custodian was asked whether he would assent to that he pointed out to the company, as he had done before, that it was not a matter for him, but for the Board of Trade, and again application was made to the Board of Trade, and again the Board of Trade declined to assent, so that the company had, whatever the representative of the Public Trustee might have written, clearly before their eyes the whole time that a question of agreeing to any of these propositions that they made, including the question of the resolution as to dividend, was one for the Board of Trade and not for the custodian. After that, in August, 1916, a vesting order was made. It is in the usual form. After reciting that it was expedient that the vesting order should be made it was ordered by the Board of Trade under the provisions of s. 4, sub-s. 1, of the Trading with the Enemy Amendment Act, 1916: "that the right to transfer the shares specified in the schedule hereto and to receive any dividends now due and to accrue due thereon do vest in the Public Trustee of Kingsway in the County of London, the custodian for England and Wales under the Trading with the Enemy Amendment Act, 1914. (2) That the said custodian is to be at liberty to transfer the said shares or any of them into his own name to be held by him as such custodian." After the making of that order the custodian did take steps to have the shares transferred into his own name and to have his name put upon the register. There was some delay in the matter. Objections were raised by the company, but eventually in February, 1917, the Public Trustee was put upon the register. After the making of that vesting order and the transfer of shares, the company knew perfectly well that the only person to whom they had to pay dividends in respect of these shares was the person whose name was upon the register; and that they were under no obligation at all after that to pay them to these enemy shareholders; but in spite of that during the whole time the war lasted they continued to act upon that and similar resolutions subsequently passed from time to time and to allow these enemy shareholders (whether they could have prevented them or not I

do not know) to pay themselves out of the assets of the company that were in Germany. These subsequent resolutions were therefore passed by the company at a time when there could have been no possible acquiescence, and when they knew they could not have continued to act exactly in the same way as they had done before under any suggested acquiescence. It is clear to my mind that they never acted by reason of the acquiescence of the Public Trustee at all.

I do not think it is necessary to consider whether a public official like the custodian could get rid of his rights by acquiescence in this way. I doubt it very much, but it is not necessary to consider it, because on the facts, so far as they are before us, I think, as I say, it is quite clear that the company never acted on any such acquiescence as is suggested. If they had done so there would have been a great deal more evidence before the learned judge as to the matter, or, at any rate, there would have been some more. Therefore I think the point of acquiescence fails.

That disposes of what took place before the vesting order and the transfer of the shares into the name of the Public Trustee. It would also govern that subsequent period, but it seems to me that there are many answers with regard to that period. From the moment that the vesting order was made the right to receive dividends was in the custodian and in no other person. It was vested in him, and from the date of the transfer to him of the shares he was the person, and the only person, to whom the dividends could be paid. With regard to that later period it seems to me wholly immaterial whether this resolution was good or bad. Even if it was good, as I do not think it was, so far as the conditions were concerned, the Public Trustee was then a shareholder in England and was entitled to be paid out of the assets in England, and he never was so paid. If the resolution was bad, as I think it was, so far as the conditions were concerned, he was entitled to be paid out of the general assets, and he never was so paid. It seems to me that with regard to the period subsequent to the vesting order the matter is quite unarguable.

C. A.

1921

ARAMAYO
FRANCKE
MINES,
LD.,
In re.

Lord Sterndale
M.R.

C. A.
1921
ARAMAYO
FRANCKE
MINES,
LD.,
In re.
—

For these reasons I think the judgment of the learned judge was right altogether, and the appeal must be dismissed with costs.

WARRINGTON L.J. I am of the same opinion. This is an appeal from two orders made by Russell J., one on July 28, 1920, and the other on November 9, 1920. Both orders were made upon an application by the Public Trustee, as custodian of enemy property under the Trading with the Enemy Acts, for payment by the company to him of certain dividends in respect of shares in the company, which is an English company, belonging to certain enemies residing in Germany. The first of these two orders, that of July 28, 1920, deals with dividends declared subsequently to a vesting order made by the Board of Trade pursuant to s. 4 of the Trading with the Enemy Amendment Act, 1916, vesting the shares in the Public Trustee as custodian of enemy property. An entry on the register was duly made of the effect of that order, and from that time the Public Trustee, as custodian, became a shareholder in the company. The Public Trustee came to the Court and said: "The company have declared dividends: they have not paid me, one of the shareholders, and I ask now for an order to be made that they shall do so," and that order has been made. So far as those dividends are concerned, and so far as the principal and interest due on certain debentures also payable to enemies are concerned, there appears to me to be no answer to the claim of the custodian. He says: "I am not an enemy; I am a shareholder in England. You have declared dividends. You have paid other shareholders; you have not paid me; now pay me." It seems to me there is no answer to that.

But the second order refers to certain dividends which have become payable on and since February 1, 1915, and before the making of the vesting order by the Board of Trade. With regard to those a different set of circumstances arises, and one must look a little more closely at what was done by the company. The application of the custodian as regards those dividends is founded upon s. 2, sub-s. 1, of the Trading

with the Enemy Amendment Act, 1914. [His Lordship read the sub-section and continued:] Now the company in the present case had two classes of shareholders: they had shareholders in England and they had shareholders in Germany. Their active business was carried on in Bolivia, where they had certain mines and factories and so forth. Their business consisted in mining in Bolivia and transmitting the produce to Germany where it was treated, and their German assets consisted of the material which had been transmitted to Germany and the proceeds of their trading with that material. Under those circumstances the directors on January 27, 1915, passed this resolution for an interim dividend, and all the dividends in question have been paid either under that or similar resolutions. [His Lordship read the resolution and continued:] The provisions of the articles which deal with the payment of dividends are contained in the fasciculus of arts. 115 to 126. I do not propose to read them all: they are more or less in common form. The two material articles, I think, are art. 117 and art. 121. [His Lordship read the articles and continued:] Under those articles it seems to me it was ultra vires of the company to attach to a dividend a condition that certain shareholders should be paid out of certain assets, and other shareholders should be paid out of other assets. Their only power was to declare a dividend to be paid to the members according to their rights and interests in the profits, that is to say, to share those profits according to the number of shares they held. Whatever may be their responsibility, whatever may be their position in other respects, under art. 121 the directors had no more power with reference to interim dividends than the company had with regard to final dividends. It seems to me, therefore, that it was entirely ultra vires either of the directors or of the company to attach any conditions such as those attempted to be attached to those resolutions.

Then it is said, that assuming that to be illegal, there was no declaration of dividend at all, because the dividend was declared subject only to the conditions. On that point I agree entirely with what was said by Russell J., and with

C. A.
1921
ARAMAYO
FRANCKE
MINES,
LD.,
In re.
Warrington L.J.

C. A.
1921
ARAMAYO
FRANCKE
MINES,
LD.,
In re.
Warrington L.J.

what has been said by the Master of the Rolls. It seems to me that they did declare and intended to declare a dividend, and that they intended that that declaration should be an effective declaration, but that in doing so they attempted to attach to it certain conditions which it was unlawful for them to attach. But in my opinion that declaration nevertheless remained valid and effectual. If that be so, then on February 1, in pursuance of the resolution which I have read and on subsequent dates pursuant to similar resolutions there became due and payable to the shareholders in Germany a dividend of 6*d.* per share.

I now go back to s. 2, sub-s. 1, of the Trading with the Enemy Amendment Act, 1914, and I find that it is there provided that where but for the state of war there would have been payable or paid to or for the benefit of an enemy by way of dividend any sum of money that sum of money shall be paid to the custodian. It was admitted that it was not so paid, and that being so, *prima facie* the custodian would be entitled now to recover it unless, of course, the claim has been barred by the Statute of Limitations. It is obviously no answer for the company to say that the Germans have paid the money to themselves out of the German assets, because they were doing that which, according to the constitution of the company, it was not lawful for them to do, so I pass that by. The money has not been paid to the custodian, and he now says: "Pay it to me."

Now there are two answers made to this claim. The first is that he has no right of action under the provisions of the statute in respect of these dividends, but that his only remedy is to apply or get the Board of Trade to apply for penalties under sub-s. 3 of s. 2. [His Lordship read the sub-section and continued:] It is contended that this is a case in which a statutory obligation is created, and a statutory means of enforcing that obligation is provided, and that according to the principles of law the statutory obligation can be enforced by those remedies which are afforded by the statute and by no other. In my judgment there are two complete answers to that contention. The first is that the statute does not

create a new obligation at all. All that it does is to substitute as the payee of the dividend the custodian in place of the shareholder. The obligation is to pay the dividends to A. B.; the statute says that the dividends shall be paid to C. D., but it does not create a fresh obligation on the company which have to make the payment; it only transfers the benefit of that obligation from one person to another. The second answer to it is that the statute does not provide a means of enforcing payment of the dividends. What the statute does is to provide penalties having no relation to the pecuniary amount which the company have to pay. It provides penalties for not complying with the directions of the statute, and that is all. In my judgment, therefore, the answer attempted to be set up on the ground I have just dealt with fails, and if that is so then the position of the company with regard to these dividends from February 1, 1915, until the vesting order is precisely the same as with regard to the dividends since the vesting order, only that their obligation to pay the dividends arises in a different way. The position is this: the custodian as the person entitled to receive these dividends says: "Pay them to me; you have not paid me," and in my judgment no answer has been made to that demand on his part.

But then it is said, and the defence is set up as covering the whole of the claim of the custodian: "Oh, but you have so acted that you can no longer complain that you have not been paid those sums of money which are due to you. You have acquiesced in what has been done," and what has been done is that the German shareholders have paid themselves out of the German assets. I am not going in detail through the correspondence. It really comes to this in the end, as Mr. Manning put it in his reply: "What we say is that the custodian, knowing what was being done, stood by and allowed these payments to be made." For the moment I will assume that to be so, although I doubt very much whether it is in accordance with the facts. That defence however is not enough; he has not been paid. It might just as well be said that an ordinary creditor is not entitled to recover

C. A.

1921

ARAMAYO
FRANCKE
MINES,
LD.,
In re.

Warrington L.J.

C. A. his debt, because he has not prevented his debtor from paying
1921 away his assets to a person who was not entitled to them.
ARAMAYO What the company would have to make out, in order to
FRANCKE succeed in their defence, would be a great deal more than
MINES, that; they would have to prove that they were misled by
LD., some conduct on the part of the custodian into making pay-
In re. ments which they were not entitled to make, and that they
Warrington L.J. do not prove or attempt to prove. It seems to me, therefore,
— that the defence on the ground of acquiescence breaks down
altogether. That is the last defence which the company set
up, and the general result, therefore, is that, in my opinion,
the two orders of Russell J. must be affirmed, and this appeal
dismissed, though as regards the second order it is not affirmed
on precisely the same grounds as those acted on by Russell J.

YOUNGER L.J. I am of the same opinion. The difficulty
in this case, as I see it, is confined exclusively to two matters,
first, to the interim dividends which were declared, and, in
a sense, received in Germany before the order of the Board
of Trade vested the shares of the shareholders who received
them in the custodian, and the other difficulty, which is less
serious, relates to the interest and principal due upon the
debentures issued by the company, which were similarly
received by the debenture holder in Germany. There is,
I think, no difficulty at all as to the dividends which were
declared upon the shares in question subsequent to the date
of the vesting order, and after the registration of the custodian
as the holder of the shares. The learned judge has decided
in favour of the custodian the question which arises with
regard to the dividends declared before the date of the vesting
order, on the ground that the payment or receipt in Germany
by the enemy holder was illegal, having regard to the pro-
visions of the Trading with the Enemy Act, 1914, with the
result that, apart altogether from the provisions of s. 2, sub-s. 1,
of the Amendment Act of 1914, the company might
properly be ordered, and he has ordered it to pay these
dividends over again to the custodian in whom by order was
vested the right to receive all unpaid dividends on the shares.

That that was the ground on which the learned judge proceeded is made quite plain by his judgment, because he reads and refers to sub-s. 2 of s. 1 of the original Trading with the Enemy Act, 1914, and while he agrees that apart from that Act the receipt in Germany by Mr. Braun of these dividends, although they were irregularly declared, and were made subject to a condition which was not binding, would have precluded Mr. Braun thereafter from asking that the dividends should be paid to him over again, he holds that by reason of the Act and by reason of the Act only the custodian's right to recover these dividends over again is unaffected by that receipt, because, as he says, all that has happened is that an individual in Germany has chosen to help himself out of certain funds belonging to the company that came within his power, an action in no way constituting payment to the shareholder either by the company or by any one duly authorized on its behalf. Now if it were necessary to accept that view of the learned judge in order to justify us in dismissing this appeal, I should, speaking for myself, require to give to the case very much more careful consideration than I have had an opportunity of doing. For, as at present advised, my view is that that part of the learned judge's order, if it must be rested on that ground, is open to serious criticism. The vesting order here, as in all cases under these Acts, vests in the custodian the interest to which the enemy is entitled in the property at the date of the vesting order. It is, as I conceive, no purpose of the vesting section of the statute to vindicate the law as to trading with the enemy or to punish its previous infraction in relation to the property which is vested. Where debts are vested, and unpaid dividends which have been declared are of course debts in that sense, no sum is, I think, vested in the custodian beyond that which the enemy himself could at the date of the order have recovered from his debtor had there been no war. Therefore, if apart from the war this particular shareholder would not have been entitled to ask for these dividends again from the company, I do not think, as at present advised, that the vesting order would enable the custodian, any more than the

C. A.

1921

ARAMAYO
FRANCKE
MINES,
LD.,
In re.

Younger L.J.
—

C. A.

1921

ARAMAYO
FRANCKE

MINES,

LD.,

In re.

Younger L.J.

shareholder in whose shoes he stands, to demand them. But the claim of the custodian to these dividends may be based on other grounds. The resolution declaring these interim dividends and the dividend resolutions of the directors passed from time to time were, I think, on the articles, entirely ultra vires, and, in my judgment, any shareholder resident either in Germany or in England was entitled individually to object to those resolutions as affecting himself. The purpose of the resolutions it is not difficult to conjecture. The directors may have adopted the form they did in order to avoid the possibility of the company being called upon to pay dividends twice over, and the directors were minded, as it seems to me, to relieve the company of that danger by adopting a form of resolution which may fairly be described as one purporting to regularise a perception by way of dividend by a shareholder resident in Germany of funds of the company situated there which would not otherwise have been either lawful or permissible. It is to this state of things that we must now apply s. 2, sub-s. 1, of the Trading with the Enemy Amendment Act, 1914. That sub-section may effect one of two things. It may, as I am inclined to think it does, effect a statutory assignment from the enemy creditor to the custodian of the right to receive the sums which are referred to in the sub-section. If it does not do so much as that, its effect, I think, quite clearly is at least to invalidate as from the date when the Act became operative any payment by the person liable of any moneys referred to in the sub-section to any person other than the custodian. A fortiori, if any reduction or alteration is made in the right to receive a dividend from a company referred to in the sub-section, to which the assent of the shareholder concerned was necessary to bind him, its effect is that no such reduction or alteration can in any way be binding if it be made without the consent of the custodian. Now if the Act be a statutory assignment *cadit quæstio*; no dividend since the passing of the Act has been paid to the custodian, and he is entitled to demand that it shall be paid in accordance with the resolution declaring a dividend, ignoring the conditions which follow that declaration, for the reasons already given by my Lord.

But if the sub-section does not effect a statutory assignment, then it appears to me that the vesting order will carry to the custodian the interest which he has in these arrears of dividend having regard to the fact that in view of s. 2, sub-s. 1, these arrears have been paid to or have been received by the wrong person, and not by himself.

The only answer, I think, that can be effectively made to that view of the matter is the defence of acquiescence, which has been put forward with great force in this Court by Mr. Edwardes Jones, and in his reply by Mr. Manning. With reference to that question I agree entirely with what has been said by the Master of the Rolls and the Lord Justice. I may put it shortly in this way. In order that the defence may prevail it must be affirmatively established by the person setting it up that he (in this case the company) has changed his position in reliance on the custodian's inactivity, in which the acquiescence consisted. It appears to me that the company has entirely failed to establish any such reliance on its part. There is no evidence directed to this matter at all, and it would require very strong evidence to neutralize the effect of two plain facts appearing on the surface of the case. The first is that before any kind of acquiescence is alleged to have taken place the company or the directors acted upon a resolution in the form that has been referred to; the second is, that after all acquiescence relied upon had ceased, namely, after the vesting order, the company continued to pass and act upon precisely similar resolutions. In other words, it appears to me that from beginning to end (I am not blaming them for doing it) the resolution, of which that set forth in the letter of March 3 may be taken as a type, was adopted by the directors for the purpose already indicated, and they initiated and persisted in that course entirely regardless of any action on the part of any of the authorities in this country with reference to the matter. But, as I have said, I entirely agree with what the Master of the Rolls and the Lord Justice have said on that subject. I merely allude to these further facts, as being short grounds upon which this plea of acquiescence can be disposed of.

C. A.

1921

ARAMAYO
FRANCKE
MINES,
L.D.,
In re.

Younger L.J.

C. A.

1921

ARAMAYO
FRANCKE
MINES,LD.,
*In re.*Younger L.J.
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For these reasons, as it seems to me, the case made in regard to the interim dividends declared before the date of the vesting order fails, and although, as at present advised, I am not ready to agree with the reasoning which led the learned judge to the same conclusion, I entirely agree with that conclusion, and, as I find that in the order as drawn up the dividends included are all subsequent to the passing of the Trading with the Enemy Amendment Act, 1914, although the learned judge's reasoning would have entitled him to include in the order also the dividends that were declared after the passing of the earlier Act, the order is, in my view, entirely correct.

In regard to the second question about which there is any difficulty, namely, the payment of the principal and interest due upon the debentures to the debenture holders resident in Germany, there can be and there is set up, of course, no plea of acquiescence at all. To my mind, agreeing as I do entirely with the effect of s. 2, sub-s. 1, as expounded by the Master of the Rolls, there can be no answer to the claim of the custodian with regard to these moneys, and in that respect I think the learned judge's judgment is correct both in its conclusions and in its reasons.

Accordingly I think the appeal ought to be dismissed.

Appeal dismissed.

Solicitors : *Coward & Hawksley, Sons & Chance ; Solicitor to Board of Trade ; Dale & Co.*

W. I. C.

In re MICHELHAM.

EVE J.

MICHELHAM *v.* MICHELHAM.1921
April 14.

[1919. M. 1258.]

Administration—Income Tax—Creditor of Estate—Interest payable under R. S. C., Order LV., r. 63—Right to deduct Income Tax—Income Tax Act, 1918 (8 & 9 Geo. 5, c. 40), First Schedule, Sch. D, Case III., r. 1 (a); All Schedules Rules, r. 21.

Where in the administration of the solvent estate of a deceased person a creditor has established a debt due to him from the deceased at the time of his death and has therefore become entitled under Order LV., r. 63, to interest at the rate of 4 per cent. per annum on the amount of the debt, the payment of interest is subject to the deduction of income tax thereon.

ADJOURNED SUMMONS.

On August 29, 1919, an order was made for the administration of the estate of the Right Honourable Herbert Baron Michelham (hereafter called the testator). Subsequently Captain J. D. Cohn established in the administration action to the satisfaction of the Court that the testator was at his death indebted to him for 22,250*l.*; and therefore under Order LV., r. 63 (1), he became entitled to interest on such debt from the date of the administration order until payment at the rate of 4 per cent. per annum. On June 29, 1920, the testator's executors paid or satisfied the debt and also paid 750*l.* interest less 225*l.* income tax on this interest. The interest was paid out of a mixed fund constituted in part by the proceeds of sale of securities realised on capital account and in part by current income already either taxed at the source or returnable for assessment to income tax in due course. It was admitted that the testator's estate was solvent.

Objection having been made to the deduction of income tax, this summons was taken out in the administration action to

(1) Order LV., r. 63: "A creditor whose debt does not carry interest, who comes in and establishes the same before the judge in chambers under a judgment or order of the

Court or of the judge in chambers, shall be entitled to interest upon his debt at the rate of four per cent. per annum from the date of the judgment or order. . . ."

EVE J. have it determined whether the executors of the testator were
 1921 entitled to deduct income tax from interest payable under
 MICHELHAM, Order LV., r. 63.
In re.

MICHELHAM
 v.
 MICHELHAM. *Danckwerts* for an executor.

A. M. Latter for Captain Cohn. The deduction of income tax can only be justified under r. 19 or r. 21 of the All Schedules Rules of the Income Tax Act, 1918. (1) The interest payable under Order LV., r. 63, is not yearly interest and therefore r. 19 has no application. Rule 21, sub-r. 1, is also inapplicable on the following grounds. First, it applies only to the "payment of any interest of money, annuity, or other annual payment." The expression "or other annual payment" is new and did not occur in s. 24, sub-s. 3, of the Customs and Inland Revenue Act, 1888, from which r. 21 is otherwise taken. This addition changes the law, and by the application of the ejusdem generis rule limits the meaning of "payment of any interest of money" to "annual payment of any interest of money." Even if this were not so, r. 21 would still not apply because the interest was not paid "out of profits or gains not brought into charge." It was paid out of a mixed fund of which part was income brought into charge, and in these circumstances the interest will be treated as paid entirely out of the profits or gains brought into charge: compare *Edinburgh Life Assurance Co. v. Lord Advocate* (2) and *Sugden v. Leeds Corporation*. (3)

[EVE J. A testator's debt is primarily payable out of the capital of his estate.]

Even so, that capital included income accrued up to the testator's death but not paid till after his death.

Lastly, r. 21 does not apply because the payment of interest was not "charged with tax under Schedule D." If it was,

(1) All Schedules Rules, r. 21, sub-r. 1: "Upon payment of any interest of money, annuity, or other annual payment charged with tax under Schedule D. . . , not payable, or not wholly payable, out of profits or gains brought into charge, the person by or through whom any

such payment is made shall deduct thereout a sum representing the amount of the tax thereon at the rate of tax in force at the time of the payment."

(2) [1910] A. C. 143.

(3) [1914] A. C. 483.

the charge must be under Sch. D, Case III., r. 1 (a), but interest payable under a rule of Court is not within its terms. On one or other of these grounds r. 21 is inapplicable as well as r. 19, and the executors were therefore not entitled to deduct income tax.

EVE J.
1921
MICHELHAM,
In re.
MICHELHAM
v.
MICHELHAM

Harman for the plaintiffs. The authorities cited have no application to a question between subject and subject. The interest was properly payable out of capital and not out of profits or gains brought into charge. Further, r. 21 clearly applies to payments of interest other than annual payments. Lastly, if the payment of interest was not chargeable to income tax under Sch. D, Case III., r. 1 (a), it was under Case VI. *Leeds Permanent Benefit Building Society v. Mallandaine*. (1)

EVE J. I do not think there is any substance in the points urged on behalf of the creditor. The first question is whether the interest on a debt payable under Order LV., r. 63, is charged with income tax at all under the Act of 1918. I think it is so charged under Sch. D, Case III., r. 1 (a) by which it is provided that the tax shall extend to "any interest of money, whether yearly or otherwise . . . , whether such payment is payable within or out of the United Kingdom, either as a charge on any property of the person paying the same by virtue of any deed or will or otherwise, or as a reservation thereout, or as a personal debt or obligation by virtue of any contract. . . ." The sum in question here is in my opinion "interest of money" owing by the testator "as a personal debt or obligation by virtue of any contract."

The next question whether this interest is "yearly interest of money" within r. 19, sub-r. 1, of the All Schedules Rules is one I am not really called upon to decide, and if it is not yearly interest r. 21 of these same rules seems to me to apply to it.

It has been argued that r. 21 does not apply for two reasons, the one because the expression "interest of money" in that rule is controlled or limited in its meaning to yearly interest by the words that follow it—namely, "annuity or other annual

EVE J. 1921 payment." I do not think this is the case ; in my opinion
MICHELHAM, " interest of money " means what it says, and its generality
In re. is not cut down by anything in the rule so as to restrict it to
MICHELHAM " yearly interest of money." The other reason suggested is
v. that as the executors paid the interest out of a mixed fund
MICHELHAM. composed in part of capital of the testator's estate and in
part of income brought into charge, the interest ought to be
treated as paid out of the latter part of the fund, with the
result that it would be excepted from the operation of the
rule as having been paid wholly out of profits or gains brought
into charge. But the interest on the debt is itself a debt of
the testator ; it is not payable wholly out of profits or gains
brought into charge ; on the contrary it is payable primarily
out of capital, and the mere fact that the executors utilise
any moneys immediately available for the payment of the
testator's debt cannot alter the position. It follows that this
interest cannot be said to be " wholly payable out of profits
or gains brought into charge," and this being so the payment
is not excepted from the operation of r. 21.

The executors therefore are under no obligation to recoup
Captain Cohn the income tax deducted from the interest
paid on his debt under Order LV., r. 63.

Solicitors : *Coward & Hawksley, Sons & Chance ; Withers &
Co. ; Michael Abrahams, Sons & Co.*

H. C. G.

END OF VOL. I.

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In the First Series,			
[1921] 1 Ch.		[1921] 2 Ch.	
In the Second Series,			
[1921] 1 K. B.	[1921] 2 K. B.	[1921] 3 K. B.	[1921] P.
In the Third Series,			
[1921] 1 A. C.		[1921] 2 A. C.	

INDEX.

- ABANDONMENT OF RIGHT OF FORFEITURE** - - - - - 107
See WAR.
- ABSENCE OF FORMAL WRITTEN AGREEMENT** - - - - - 291
See VENDOR AND PURCHASER 2.
- ABSENCE OF WORDS OF LIMITATION**
See SETTLEMENT 1. 432
- ABSOLUTE POWER OF APPOINTMENT** 475
See WILL 9.
- "ABSOLUTELY"**—In devise of real estate 566
See VENDOR AND PURCHASER 4.
- ACCELERATION**—Second life estate - 491
See WILL 6.
- ACCEPTANCE OF OFFER**—Contract - 57
See VENDOR AND PURCHASER 1.
- ACQUISITION OF LAND (ASSESSMENT OF COMPENSATION) ACT, 1919** 299
See LAND.
- ACTION**—Cause of - - - - - 522
See FOREIGN JUDGMENT.
- ADMINISTRATION** — Estate of insolvent Debtor—Loan by Wife for Purposes of Business—Subsequent Bond substituting Annuity—Right to prove—Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 3—Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 36, sub-s. 2. In re SLADE. CREWKERNE UNITED BREWERIES v. SLADE
Sargant J. 160
2. — Income Tax—Creditor of Estate—Interest payable under R. S. C., Order LV., r. 63—Right to deduct Income Tax—Income Tax Act, 1918 (8 & 9 Geo. 5, c. 40), First Schedule, Sch. D, Case iii., r. 1 (a); All
- ADMINISTRATION**—continued.
Schedules Rules, r. 21. In re MICHELHAM. MICHELHAM v. MICHELHAM - Eve J. 705
- AFFILIATION ORDER** - - - - - 522
See FOREIGN JUDGMENT.
- AGISTMENT** - - - - - 90
See LANDLORD AND TENANT 1.
- AGREEMENT**—Compounding rates - 550
See LOCAL GOVERNMENT.
- For option to publish novels - 631
See COPYRIGHT 1.
- ALIEN ENEMY**—War—Emergency Legislation—Practice—Pre-war Debt due from German National to British National—Recovery—Jurisdiction of Court—Trading with the Enemy Amendment Act, 1914 (5 Geo. 5, c. 12), s. 5, sub-s. 2—Treaty of Peace with Germany, Part X., Ss. III., IV.—Treaty of Peace Act, 1919 (9 & 10 Geo. 5, c. 33), s. 1—Treaty of Peace Order, 1919, s. 1, sub-ss. 1, 2, 3.
In re NIERHAUS - - - - - Russell J. 269
2. — War — Emergency Legislation — Winding Up of Enemy Business—Debt due from German National — Recovery — Jurisdiction of Court—Discretion—Trading with the Enemy Amendment Act, 1914 (5 Geo. 5, c. 12), s. 5, sub-ss. 1, 2—Treaty of Peace with Germany, Part X., S. III., arts. 296, 297.
In re NATIONAL BANK FÜR DEUTSCHLAND. In re ANGLO-AUSTRIAN BANK (LONDON AGENCY) - - - - - Russell J. 284
3. — War—Company — Declaration of Dividend—Conditions of Payment—Validity — Vesting Order—Right to receive Dividends — "Now due and to accrue due"—Debentures—Right to Interest and Capital—Trading with the Enemy Act, 1914 (4 & 5 Geo. 5, c. 87), s. 1, sub-ss. 1, 2—Trading with the Enemy Amendment Act, 1914 (5 Geo. 5,

ALIEN ENEMY—continued.

c. 12), s. 2, sub-ss. 1, 3—*Trading with the Enemy Amendment Act, 1915* (5 & 6 Geo. 5, c. 79), s. 1, sub-ss. 1, 3—*Trading with the Enemy Amendment Act, 1916* (5 & 6 Geo. 5, c. 105), s. 4.

In re ARAMAYO FRANCKE MINES, LD.

C. A. 675

ALTERATION OF TRADE CONDITIONS

See EMERGENCY LEGISLATION 2.

APPOINTMENT - - - - 34, 475

See POWER OF APPOINTMENT;
WILL 9.

" APPURTENANCES " - - - 322

See EASEMENT.

ASSIGNEE OF PART OF A DEBT - 349

See COMPANY 4.

ATLANTIC CABLE - - - - 370

See EMERGENCY LEGISLATION 1.

AUCTIONEERS - - - - 642

See RESTRAINT OF TRADE.

AUTHORSHIP - - - - 503, 631

See COPYRIGHT 1, 2.

AVAILABLE ALTERNATIVE ACCOMMODATION - - - - 404

See EMERGENCY LEGISLATION 3.

BANKRUPTCY—*Disclaimer—Fully paid Shares—Equitable Charges thereon—Disclaimer of Trustee's Interest—Bankrupt's Name still on Register—Right to vote on Behalf of Mortgagees—Bankruptcy Act, 1914* (4 & 5 Geo. 5, c. 59), s. 54. *WISE v. LANSDELL* - - - - **Astbury J. 420**

— Estate of deceased insolvent - 160
See ADMINISTRATION 1.

BATHS AND WASHHOUSES ACTS 440

See CORPORATION 1.

BELLIGERENT SOVEREIGN—Private property of - - - - 107
See WAR.

BRITISH DOMINIONS - - - - 409
See CHARITY 1.

CAPITAL OR INCOME - - - - 585
See SETTLEMENT 4.

CAPITALIZATION OF INCOME - - 585
See SETTLEMENT 4.

— Of interest - - - - 172
See REVENUE.

CASES :—

— *Aldin v. Latimer Clark, Muirhead & Co.* [1894] 2 Ch. 437.
Applied. *In re HARMER v. JUMBIL* (NIGERIA) TIN AREAS, LD.
C. A. 200

— *Allen v. Flood* - [1898] A. C. 1
Dicta of Lord Watson, Lord Herschell and Lord Macnaghten in, applied. *WHITE v. RILEY* A. C. 1

CASES—continued.

— *Allen v. Taylor* (1880) 16 Ch. D. 355.
Applied. *HANSFORD v. JAGO* - 322

— *Archer's Case* (1597) 1 Rep. 66 b.
Applied. *In re HUSSEY & GREEN'S CONTRACT* - - - - 566

— *Barker v. Stickney* [1919] 1 K. B. 121.
Distinguished. *ERSKINE MACDONALD, LD. v. EYLES* - - 631

— *Bolton v. Bolton* (1879) 11 Ch. D. 968.
Explained. *HANSFORD v. JAGO* 322

— *Bowyer's Settled Estates, In re* [1892] W. N. 48; 8 T. L. R. 44.
Applied. *In re DUKE OF WESTMINSTER'S SETTLED ESTATES* - 586

— *Breay v. Royal British Nurses' Association* [1897] 2 Ch. 272.
Applied: *JENKIN v. PHARMACEUTICAL SOCIETY OF GREAT BRITAIN* 392

— *British Red Cross Balkan Fund, In re* [1914] 2 Ch. 419.
Distinguished. *WELSH HOSPITAL (NETLEY) FUND, In re. THOMAS v. ATT.-GEN.* - - - - 655

— *Brown v. Alabaster* (1887) 37 Ch. D. 490.
Applied. *HANSFORD v. JAGO* - 322

— *Broune v. Flower* [1911] 1 Ch. 219, 225.
Applied. *HARMER v. JUMBIL* (NIGERIA) TIN AREAS, LD.
C. A. 200

— *Brydone's Settlement, In re* [1903] 2 Ch. 84.
Followed. *In re ELLIS'S SETTLEMENT. WASBROUGH v. BOYCE*
C. A. 230

— *Cardross, In re* (1878) 7 Ch. D. 728.
Followed. *In re SUTTON. BOSCAWEN v. WYNDEHAM* - - 257

— *Carrick v. Errington* (1728) 2 P. Wms. 361.
Distinguished. *In re CONYNNGHAM. CONYNNGHAM v. CONYNNGHAM*
C. A. 491

— *Christie v. Gosling* (1866) L. R. 1 H. L. 279, 290.
Applied. *In re HARCOURT. VISCOUNT PORTMAN v. PORTMAN* 188

— *Cockayne v. Harrison* (1872) L. R. 13 Eq. 432.
Considered and applied. *In re POWELL. DODD v. WILLIAMS* 178

— *Conlan v. Carlow County Council* [1912] 1 I. R. 535.
Followed. *In re STEEL WING CO., LD.* - - - - 349

— *Conyngham, In re. Conyngham v. Conyngham* [1920] 2 Ch. 495.
Affirmed - - - - C. A. 491

— *Coope v. Ridout* [1920] 2 Ch. 411.
Affirmed - - - - C. A. 291

CASES—continued.

- *Cottrell v. Cottrell* (1885) 28 Ch. D. 628.
Applied. *In re* DUKE OF WESTMINSTER'S SETTLED ESTATES - 586
- *Craven's Mortgage*, *In re* [1907] 2 Ch. 448.
Followed. *In re* MORRIS. MAYHEW *v.* HALTON - - - 127
- *Davis v. Town Properties Investment Corporation* [1903] 1 Ch. 797.
Applied. *HARMER v.* JUMBIL (NIGERIA) TIN AREAS, LD. - - - C. A. 200
- *De Brimont v. Penniman* (1873) 10 Blatchford's C. C. R. 436.
Applied. *In re* MACARTNEY. MACFARLANE *v.* MACARTNEY - 522
- *De Mattos v. Gibson* (1859) 4 De G. & J. 276.
Applied. *ERSKINE MACDONALD*, LD. *v.* EYLES - - - 632
- *D'Eyncourt v. Gregory* [1864] 34 Beav. 36
Followed. *In re* CONYNTHAM. CONYNTHAM *v.* CONYNTHAM - - - C. A. 491
- *Dillon*, *In re* [1890] 44 Ch. D. 76.
Followed. *In re* RICHARDS. JONES *v.* REBBECK - - - 514
- *Donnelly v. Adams* [1905] 1 I. R. 154.
Judgment of Barton J. in, discussed and explained. *HANSFORD v.* JAGO - - - 323
- *Eales v. Drake* (1875) 1 Ch. D. 217.
Considered. *In re* WEST. DENTON *v.* WEST - - - 533
- *Ellis's Settlement*, *In re.* Wasbrough *v.* Boyce.
Affirmed - - - C. A. 230
- *Espuela Land & Cattle Co.*, *In re* [1919] 2 Ch. 187.
Followed. *ANGLO-FRENCH MUSIC CO.*, LD. *v.* NICOLL - - - 286
- *Falcke v. Gray* (1859) 4 Drew. 651.
Applied. *ERSKINE MACDONALD*, LD. *v.* EYLES - - - 632
- *Foley v. Burnell* (1783) 1 Bro. C. C. 274.
Applied. *In re* HARCOURT. VISCOUNT PORTMAN *v.* PORTMAN 187
- *Forster v. Baker* [1910] 2 K. B. 636.
Followed. *In re* STEEL WING CO., LD. - - - 349
- *Fraser & Chalmers, Ltd.*, *In re* [1919] 2 Ch. 114.
Followed. *ANGLO-FRENCH MUSIC CO.*, LD. *v.* NICOLL - - - 286
- *Groves v. Wright* (1856) 2 K. & J. 347.
Considered and applied. *In re* POWELL. DODD *v.* WILLIAMS 178
- *Gunston v. Winox, Ltd.* [1921] 1 Ch. 165.
Reversed - - - C. A. 664
- *Harrington, Countess of v. Harrington, Earl of* (1871) L. R. 5 H. L. 87.

CASES—continued.

- Explained. *In re* HARCOURT. VISCOUNT PORTMAN *v.* PORTMAN 188
- *Harrop v. Harrop* [1920] 3 K. B. 386.
Applied. *In re* MACARTNEY. MACFARLANE *v.* MACARTNEY - 522
- *Heathcote*, *In re* [1891] W. N. 10.
Considered. *In re* WEST. DENTON *v.* WEST - - - 533
- *Hinckes*, *In re.* *Dashwood v. Hinckes* [1920] 2 Ch. 511.
Affirmed - - - C. A. 475
- *Hodges v. Webb* [1920] 2 Ch. 70.
Approved. *WHITE v.* RILEY - - - C. A. 1
- *Hopkins v. Hopkins* (1738) Cas. temp. Talb. 43; 1 Atk. 581.
Distinguished. *In re* CONYNTHAM. CONYNTHAM *v.* CONYNTHAM - - - C. A. 491
- *Lord Chesham's Settlement*, *In re* [1909] 2 Ch. 329.
Distinguished. *In re* HARCOURT. VISCOUNT PORTMAN *v.* HARCOURT 187
- *Macmahon v. Macmahon* [1913] 1 I. R. 428.
Followed. *In re* MEYRICK'S SETTLEMENT. MEYRICK *v.* MEYRICK 311
- *Mills v. Farmer* (1815) 1 Mer. 55.
Principle laid down by Lord Eldon, applied. *In re* WILLIS. SHAW *v.* WILLIS - - - C. A. 44
- *Moggridge v. Thackwell* (1803) 7 Ves. 36.
Principle laid down by Lord Eldon, applied. *In re* WILLIS. SHAW *v.* WILLIS - - - C. A. 44
- *Montgomery Moore Ship Syndicate, Ltd.*, *In re* [1903] 72 L. J. (Ch.) 624.
Followed. *In re* STEEL WING CO., LD. - - - 349
- *National Telephone Co.*, *In re* [1914] 1 Ch. 755.
Not followed. *ANGLO-FRENCH MUSIC CO.*, LD. - - - 286
- *New Zealand Shipping Co. v. Société des Ateliers et Chantiers de France* [1913] A. C. 1.
Applied. *In re* MEYRICK'S SETTLEMENT. MEYRICK *v.* MEYRICK 311
- *North v. Percival* - [1898] 2 Ch. 128.
Disapproved. *ROSSDALE v.* DENNY - - - C. A. 57
- *Nouvion v. Freeman* (1889) 15 A. C. 1.
Applied. *In re* MACARTNEY. MACFARLANE *v.* MACARTNEY - 522
- *Nutton v. Wilson* (1889) 22 Q. B. D. 744.
Applied. *HOLDEN v.* SOUTHWARK CORPORATION - - - 550
- *Oliver v. Hinton* - [1899] 2 Ch. 264.
Applied and distinguished. *HUDSTON v.* VINEY - - - 98

CASES—continued.

- *Paine v. Countess of Warwick* [1914] 2 K. B. 486.
Considered and applied. *In re POWELL. DODD v. WILLIAMS* 178
- *Palmer, In re* [1916] 2 Ch. 391.
Followed. *In re WEDGWOOD. ALLEN v. PUBLIC TRUSTEE* - 602
- *Parker, In re* (1917) L. T. 422.
Distinguished. *In re WEDGWOOD. ALLEN v. PUBLIC TRUSTEE* - 602
- *Printing and Numerical Registering Co. v. Sampson* (1875) L. R. 19 Eq. 462.
Applied. *ERSKINE MACDONALD, LD. v. EYLES* - - - 632
- *Purser v. Purser* [1913] 1 I. R. 428.
Followed. *In re MEYRICK'S SETTLEMENT. MEYRICK v. MEYRICK* 311
- *Rendall v. Crystal Palace Co.* (1858) 4 K. & J. 326.
Applied. *JENKIN v. PHARMACEUTICAL SOCIETY OF GREAT BRITAIN* 392
- *Rousillon v. Rousillon* (1880) 14 Ch. D. 351.
Applied. *In re MACARTNEY. MACFARLANE v. MACARTNEY* - 522
- *Rucker v. Schofield* (1862) 1 H. & M. 36.
Considered. *In re WEST. DENTON v. WEST* - - - 533
- *Rudd v. Bowler* [1912] 2 Ch. 60.
Applied. *HANSFORD v. JAGO* 323
- *Scott, In re* [1911] 2 Ch. 374.
Distinguished. *In re CONYNHAM. CONYNHAM v. CONYNHAM* C. A. 491
- *Shelley's Case* (1581) 1 Rep. 93b.
Distinguished. *In re HUSSEY'S AND GREEN'S CONTRACT* - - 566
- *Skipper v. Holloway* [1910] 2 K. B. 630.
Not followed. *In re STEEL WING Co.* - - - 349
- *Stoddart, In re* [1916] 2 Ch. 444.
Distinguished. *In re WEDGWOOD. ALLEN v. PUBLIC TRUSTEE* C. A. 602
- *Swanborough v. Coventry* (1832) 9 Bing. 305.
Applied. *HANSFORD v. JAGO* 322
- *Tate v. Fullbrook* [1908] 1 K. B. 821.
Followed. *TATE v. THOMAS* - 504
- *Thomas v. Owen* (1877) 20 K. B. D. 225.
Followed. *HANSFORD v. JAGO* 322
- *Valentine v. Hyde* [1919] 2 Ch. 129.
Disapproved. *WHITE v. RILEY* C. A. 1
- *Vandergucht v. De Blaquiere* (1839) 2 My. & Cr. 229.
View of Lord Cottenham, adopted. *In re MEYRICK'S SETTLEMENT. MEYRICK v. MEYRICK* - - 311
- *Von Hatzfeldt Wildenburg v. Alexander* [1912] 1 Ch. 284.
Applied. *COOPE v. RIDOUT* C. A. 291

CASES—continued.

- *Ward v. Society of Attornies* (1844) 1 Coll. 370.
Applied. *JENKIN v. PHARMACEUTICAL SOCIETY OF GREAT BRITAIN* 392
- *Ward, Lock & Co. v. Long* [1906] 2 Ch. 550.
Applied. *ERSKINE MACDONALD, LD. v. EYLES* - - - 632
- *Westropp, In re* [1903] 37 Ir. L. T. R. 183.
Considered. *In re WEST. DENTON v. WEST* - - - 533
- *Willis, In re* [1917] 1 Ch. 365.
Followed. *In re CONYNHAM. CONYNHAM v. CONYNHAM* C. A. 491
- *Willis, In re. Shaw v. Willis* [1920] 2 Ch. 358.
Reversed - - - C. A. 44
- *Winn v. Bull* (1877) 7 Ch. 29.
Applied. *COOPE v. RIDOUT* C. A. 291
- *Wolf v. Oxholm* (1817) 6 M. & S. 92.
Distinguished. *In re FERDINAND, Ex-Tsar of Bulgaria* - C. A. 107

CAUSE OF ACTION NOT KNOWN IN ENGLAND - - - 522
See FOREIGN JUDGMENT.

CHARITY—Charters of 1854 and 1873—Scope—"Clergymen of the established church of England and Ireland"—Disestablishment of Irish and Welsh Churches—Cure outside England—Ireland—Wales—Scotland—British Dominions—Irish Church Act, 1869 (32 & 33 Vict. c. 42), s. 69—Welsh Church Act, 1914 (4 & 5 Geo. 5, c. 91), s. 2, sub-s. 4—Welsh Church (Temporalities) Act, 1919 (9 & 10 Geo. 5, c. 65), s. 7, sub-s. 2.
In re FRIEND OF THE CLERGY'S CHARTERS. FRIEND OF THE CLERGY v. ATT-GEN.

Astbury J. 409

2. — Hospital for sick and wounded Soldiers—Hospital closed—Surplus Assets—Resulting Trust—General charitable Intention—Cy-près.

In re WELSH HOSPITAL (NETLEY) FUND. THOMAS v. ATT-GEN.

P. O. Lawrence J. 655

— General charitable intention - 44
See WILL 2.

CHARTER - - - 409
See CHARITY 1.

CHEMICAL MANUFACTURER - - 359
See COMPANY 2.

CHOSSES IN ACTION - - - 107
See WAR.

CINEMATOGRAPH FILM - - - 503
See COPYRIGHT 2.

CLERGY OF THE ESTABLISHED CHURCH - 409
See CHARITY 1.

CLERK - 642
See RESTRAINT OF TRADE.

COERCION OF EMPLOYERS - 1
See TRADE UNION.

COLLECTIVE WORK - 503
See COPYRIGHT 2.

COMMON OWNER—Conveyances by - 322
See EASEMENT.

COMPANY — Directors — Misfeasance —
Transaction ultra vires the Company—Honest
 Error of Judgment — Counsel's Opinion—
 Relief from Liability — Companies (Con-
 solidation) Act, 1908 (8 Edw. 7, c. 69), s. 279.
In re CLARIDGE'S PATENT ASPHALTE
 Co., LD. - Astbury J. 543

2. — Memorandum of Association —
 Objects and Powers—Chemical Manufacturers
 —Resolution — Validity—Grant for scien-
 tific Research—"Incidental or conducive"
 to the main object.
EVANS v. BRUNNER, MOND & Co., LD.
 Eve J. 359

3. — Memorandum — Construction —
 Preference and Ordinary Shareholders —
 Rights inter se—Surplus Assets in Event of
 Winding Up—Right to participate.
In re ANGLO-FRENCH MUSIC Co., LD.
 Eve J. 286

4. — Winding Up—Right to present
 a Petition—Assignee of Part of Debt—
 "Creditor"—"At law or in equity"—
 Judicature Act, 1873 (36 & 37 Vict. c. 66),
 s. 25, sub-s. 6—Companies (Consolidation)
 Act, 1908 (8 Edw. 7, c. 69), ss. 130, 137.
In re STEEL WING Co., LD.
 P. O. Lawrence J. 349

— Debentures—Shares - 675
See ALIEN ENEMY 1.

— Voluntary winding up - 575
See LANDLORD AND TENANT 3.

COMPETITION - 642
See RESTRAINT OF TRADE.

COMPOUND INTEREST - 172
See REVENUE.

**COMPULSORY ACQUISITION OF LAND
 FOR PUBLIC PURPOSES** - 299
See LAND.

CONDITIONAL OFFER - 57, 291
See VENDOR AND PURCHASER 1, 2.

CONFIRMATION BY STATUTE—Charter
See CORPORATION 2. 392

CONFISCATION OF PROPERTY - 107
See WAR.

CONFLICT OF LAWS - 343, 522
See DONATIO MORTIS CAUSA 1;
 FOREIGN JUDGMENT.

**CONSENT OF TRUSTEES TO EXERCISE
 OF POWER** - 34
See POWER OF APPOINTMENT.

CONSPIRACY - 1
See TRADE UNION.

CONTRACT—Agreed terms embodied in
 draft - 291
See VENDOR AND PURCHASER 2.

— Annulment of—Serious hardship - 455
See EMERGENCY LEGISLATION 2.

— Breach of - 1
See TRADE UNION.

— Enforcement of—Cable - 370
See EMERGENCY LEGISLATION 1.

— Of tenancy - 370
See EMERGENCY LEGISLATION 1.

— On correspondence - 57
See VENDOR AND PURCHASER 1.

— Specific performance - 57
See VENDOR AND PURCHASER 1.

CONTRACT OF SERVICE - 642
See RESTRAINT OF TRADE.

CONTRARY INTENTION - 322
See EASEMENT.

CONVEYANCING ACT, 1831 - 322
See EASEMENT.

COPYRIGHT—Agreement to give Publishers
 Offer of Authoress's "next three books"—
 Option to acquire Interest in Copyright—
 Next Novel sent to rival Firm—Breach of
 Agreement—Notice — Injunction—Copy-
 right Act, 1911 (1 & 2 Geo. 5, c. 46), s. 1,
 sub-s. 2; s. 5, sub-s. 2 and 3.
ERSKINE MACDONALD, LD. v. EYLES
 Peterson J. 631

— Design—Invalid registration - 664
See DESIGN.

2. — Infringement — Musical Play —
 Authorship — Collective Work—Cinematog-
 raph Film Production—Licence—Copyright
 Act, 1911 (1 & 2 Geo. 5, c. 46), ss. 1, 5, 8, 16,
 sub-ss. 3, 35.
TATE v. THOMAS - Eve J. 503.

CORPORATION—Municipal Corporation —
 Enterprise of carrying on a Laundry Business
 — Ultra vires—Baths and Washhouses Act,
 1846 (9 & 10 Vict. c. 74)—Baths and Wash-
 houses Act, 1847 (10 & 11 Vict. c. 61).
ATT.-GEN. v. FULHAM CORPORATION
 Sargent J. 440

2. — Royal Charter—Confirmation by
 Statute—Proposed industrial Council and
 Trade Regulations—Ultra vires—Injunction
 —Power of Member to obtain—Pharmacy Act,
 1852 (15 & 16 Vict. c. 56).
*JENKINS v. PHARMACEUTICAL SOCIETY OF
 GREAT BRITAIN* - Peterson J. 392

COSTS - 455
See EMERGENCY LEGISLATION 2.

- COUNCILLOR**—Disqualification of - 550
See LOCAL GOVERNMENT.
- COUNSEL'S OPINION** - - - 543
See COMPANY 1.
- COURTS (EMERGENCY POWERS) ACTS**
370, 455
See EMERGENCY LEGISLATION 1, 2.
- COVENANT**—Breach of - - - 90
See LANDLORD AND TENANT 1.
- Not to assign without consent - 575
See LANDLORD AND TENANT 3.
- Not to underlet, etc. - - - 90
See LANDLORD AND TENANT 1.
- COVENANT FOR QUIET ENJOYMENT** 200
See LEASE.
- "CREDITOR"**—Winding-up petition 349
See COMPANY 4.
- CREDITOR OF ESTATE** - - - 705
See ADMINISTRATION 2.
- CROWN'S RIGHT OF FORFEITURE** - 107
See WAR.
- CURE OUTSIDE ENGLAND**—Clergy - 409
See CHARITY 1.
- CY-PRÈS** - - - - - 655
See CHARITY 2.
- "DEATH WITHOUT HAVING BEEN MARRIED"** - - - 230
See SETTLEMENT 3.
- DEBENTURES**—Dividends - - - 675
See ALIEN ENEMY 3.
- DEBT**—Assignee of part of a - - - 349
See COMPANY 4.
- Of German national - - - 269, 284
See ALIEN ENEMY 1, 2.
- DEFEASIBLE LIFE INTEREST** - - - 533
See SETTLEMENT 2.
- DEROGATION FROM GRANT** - - - 322
See EASEMENT.
- DESIGN**—Copyright — Registration—Prior Publication—Disclosure to Trader to obtain Order—No Delivery before Registration — Invalidity of subsequent Registration—Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 55 — Copyright Act, 1911 (1 & 2 Geo. 5, c. 46), s. 22. *GUNSTON v. WINOX, LD.*
Decision of Astbury J. [1921] 1 Ch. 165 reversed - - - C. A. 664
- DIRECTORS**—Misfeasance - - - 543
See COMPANY 1.
- DISCLAIMER**—Trustee in bankruptcy. 420
See BANKRUPTCY.
- DISCLOSURE OF DESIGN** - - - 664
See DESIGN.
- DISCRETION**—Exercise of - - - 44
See WILL 2.
- Of Court - - - - - 284
See ALIEN ENEMY 2.
- DISESTABLISHMENT OF IRISH AND WELSH CHURCHES** - - - 409
See CHARITY 1.
- DISPUTE BETWEEN WORKMEN AND WORKMEN** - - - - - 1
See TRADE UNION
- DIVIDENDS ON SHARES** - - - 675
See ALIEN ENEMY 3.
- DOMICIL** - - - - - 343
See DONATIO MORTIS CAUSA 1.
- DONATIO MORTIS CAUSA** — *Movables—Contemplation of Death—Memorandum of Trust—Donor of Russian Domicil—Conflict of Laws—Lex situs.*
In re KORVINE'S TRUST. LEVASHOFF v. BLOCK - - - - - Eve J. 343
2. — *Registered Victory Bonds—Subject Matter—Incomplete Gift—Validity—Executors—Registration of Donee as Owner.*
In re RICHARDS. JONES v. REBBECK
Eve J. 513
- DONEE OF POWER**—Person of unsound mind - - - - - 34
See POWER OF APPOINTMENT.
- DRAFT CONTRACT**—Agreed terms embodied in - - - - - 291
See VENDOR AND PURCHASER 2.
- EASEMENT**—Right of Way—Simultaneous Conveyances by Common Owner to different Persons—"Appurtenances"—Express Grant—Contrary Intention—Implied Grant—Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 6, sub-s. 2, 4.
HANSFORD v. JAGO - - - Russell J. 322
- EMERGENCY LEGISLATION** — *Atlantic Cable — Contract of Tenancy — Relief — "Incur any forfeiture" — Courts (Emergency Powers) Act, 1917 (7 & 8 Geo. 5, c. 25), s. 2 — "Enforcement of the contract" — "Shortage of shipping" — Courts (Emergency Powers) Act, 1919 (9 & 10 Geo. 5, c. 64), s. 1, sub-s. 1 (a), (b).*
DIRECT UNITED STATES CABLE CO. AND THE WESTERN UNION TELEGRAPH CO.'S CONTRACT OF TENANCY, *In re. DIRECT UNITED STATES CABLE CO. v. WESTERN UNION TELEGRAPH CO.* - Peterson J. 370
2. — *Contract—Rise in Cost of Coal and Labour — "Alteration of trade conditions occasioned by the war" — "Serious hardship" — Jurisdiction—Contract annulled—Courts (Emergency Powers) Act, 1917 (7 & 8 Geo. 5, c. 25), s. 1, sub-s. 1—Courts (Emergency Powers) Act, 1919 (9 & 10 Geo. 5, c. 64), s. 1, sub-s. 1 (a)—Costs.*

EMERGENCY LEGISLATION—continued.

NORTH METROPOLITAN ELECTRIC POWER
SUPPLY CO. v. STOKE NEWINGTON COR-
PORATION - - - P. O. Lawrence J. 455
— Enemy business—Winding up of
284

See ALIEN ENEMY 2.

3. — Landlord and Tenant—Recovery of
Possession—"Reasonably required" as a
Residence for Landlord—Required at Trial of
Action—Available alternative Accommoda-
tion—Onus of Proof—Increase of Rent and
Mortgage Interest (Restrictions) Act, 1920
(10 & 11 Geo. 5, c. 17), s. 5, sub-s. 1 (b) (d).
NEVILLE v. HARDY - Peterson J. 404

ENEMY DEBTS - - - 269, 284
See ALIEN ENEMY 1, 2.

ENEMY PROPERTY - - - 107
See ALIEN ENEMY 3; WAR.

EQUITABLE CHARGE - - - 98
See VENDOR AND PURCHASER 3.

EQUITABLE LIMITATIONS - - - 491
See WILL 6.

ESTATE AGENT - - - 642
See RESTRAINT OF TRADE.

ESTATE DUTY—Incidence of - - - 601
See WILL 7.

ESTATE TAIL NOT IN ESSE - - - 491
See WILL 6.

EXCHANGE—Power of - - - 585
See SETTLEMENT 4.

EXECUTORS—Duty of - - - 513
See DONATIO MORTIS CAUSA 2.

EXPLOSIVES ACT, 1875 - - - 200
See LEASE.

EXPRESS GRANT - - - 322
See EASEMENT.

FARMING STOCK—Bequest of - - - 178
See WILL 1.

FOREIGN JUDGMENT—Conflict of Laws—
Enforcement—Affiliation Order against de-
ceased Father's Estate—Public Policy—Cause
of Action unknown in England—Final and
Conclusive.

In re MACARTNEY. MACFARLANE v.
MACARTNEY - - - Astbury J. 522

FORMAL AGREEMENT INTER PARTES —
Absence of - - - 291
See VENDOR AND PURCHASER 2.

FULLY PAID SHARES—Disclaimer by
trustee - - - 420
See BANKRUPTCY.

FUTURE SEPARATION—Provision of 311
See HUSBAND AND WIFE.

GENERAL CHARITABLE INTENT - 655
See CHARITY 2.

GENERAL POWER - - - 34
See POWER OF APPOINTMENT.

GERMAN NATIONAL—Debts of 269, 284
See ALIEN ENEMY 1, 2.

— Gift to - - - 149
See WILL 3.

GERMANY—Treaty of Peace with 269, 284
See ALIEN ENEMY 1, 2.

GIFT OVER—On death without issue at-
taining 21 - - - 306
See WILL 5.

GRANT—Derogation from - - - 200
See LEASE.

— Express—Implied - - - 322
See EASEMENT.

— For scientific research - - - 359
See COMPANY 2.

GRASS KEEP—Lease or sale of - - - 90
See LANDLORD AND TENANT 1.

HEIR-AT-LAW - - - 566
See VENDOR AND PURCHASER 4.

HEIRLOOMS—To go with mansion - 187
See WILL 4.

HONEST ERROR OF JUDGMENT—Directors
See COMPANY 1. 543

HOSPITAL FOR SICK AND WOUNDED
SOLDIERS - - - 655
See CHARITY 2.

HOTCHPOT - - - 533
See SETTLEMENT 2.

HUSBAND AND WIFE—Reconciliation Deed
— Provision in Event of future Separation—
Validity—Public Policy—"Take legal pro-
ceedings"—"Void"—Construction.
In re MEYRICK'S SETTLEMENT. MEYRICK
v. MEYRICK - - - Russell J. 311

— Second marriage of wife—Settlement on
See SETTLEMENT 3. 230

IMPLIED GRANT - - - 322
See EASEMENT.

IMPLIED OBLIGATION - - - 200
See LEASE.

INCOME TAX—Deduction from interest
172, 705
See ADMINISTRATION 2; REVENUE.

INCREASE OF RENT AND MORTGAGE
INTEREST (RESTRICTIONS) ACT
404
See EMERGENCY LEGISLATION 3.

INFANT LEGATEE — Consent of — Power
appendant - - - 257
See WILL 8.

- INFRINGEMENT OF COPYRIGHT** - 503
See COPYRIGHT 2.
- INJUNCTION**—Right of member to - 392
See CORPORATION 2.
- INSOLVENT DEBTOR**—Estate of - 160
See ADMINISTRATION 1.
- INTEREST**—R. S. C., Order LV., r. 63 - 705
See ADMINISTRATION 2.
- INVALIDITY OF REGISTRATION** - 664
See DESIGN.
- IRELAND**—Clergy of - - - 409
See CHARITY 1.
- IRISH CHURCH**—Disestablishment of.
See CHARITY 1.
- JOINTURE**—Power to - - - 475
See WILL 9.
- JUDICATURE ACT, 1873** - - - 349
See COMPANY 4.
- JURISDICTION OF COURT** - 269, 284, 455
See ALIEN ENEMY 1, 2; EMERGENCY LEGISLATION 2.
- KEEPING UP VALUE OF FARMING STOCK**
See WILL 1. 178
- LAND**—Compulsory Acquisition for Public Purposes—Acquisition of Land (Assessment of Compensation) Act, 1919 (9 & 10 Geo. 5, c. 57), s. 1, sub-s. 1; s. 12, sub-s. 2—"Public authority"—Definition—"Not trading for profit"—Metropolitan Water Board.
METROPOLITAN WATER BOARD v. BERTON Peterson J. 299
- LANDLORD AND TENANT**—Lease of Farm—Covenant not to underlet or permit any other Person to use or occupy any Part of the Premises—Letting of Grass Keep, i.e., growing Herbage—Breach of Covenant—Agistment.
RICHARDS v. DAVIES - P. O. Lawrence J. 90
2. — Notice to quit—Sale of Reversion in Two Lots—Notices by Purchasers on different Days—Validity of Notices.
In re BEBINGTON'S TENANCY. BEBINGTON v. WILDMAN - - - Peterson J. 559
— Recovery of possession - - - 404
See EMERGENCY LEGISLATION 3.
3. — Underlease—Covenant not to assign without Consent—Cross-covenant by Lessor—Consent not to be unreasonably withheld—Private Company—Voluntary Liquidation—Reconstruction—Refusal of Consent to Assignments—Reasonableness.
IDEAL FILM RENTING CO., LD. v. NIELSEN Eve J. 575
- LAUNDRY BUSINESS**—Ultra vires - 440
See CORPORATION 1.
- LEASE**—Explosives Magazine—Packing Shed—Licences—Buildings within prohibited Distances—Grant—Derogation—Covenant for quiet Enjoyment—Implied Obligations—Explosives Act, 1875 (38 & 39 Vict. c. 17), ss. 5, 6.
HARMER v. JUMBIL (NIGERIA) TIN AREAS, LD. - - - C. A. 200
- LEASEHOLDS**—Exchange for freeholds - 585
See SETTLEMENT 4.
— Power to acquire surrender of - 585
See SETTLEMENT 4.
- LEGACY DUTY**—Incidence of - - - 601
See WILL 7.
- LESSEE OF MANSION HOUSE** - - - 475
See WILL 4.
- LEX SITUS**—Movables - - - 343
See DONATIO MORTIS CAUSA 1
- LICENCE**—Explosives - - - 200
See LEASE.
- LIFE ESTATE**—Absence of words of limitation - - - 432
See SETTLEMENT 1.
— Acceleration of - - - 491
See WILL 6.
— Revocation of - - - 491
See WILL 6.
- LIFE INTEREST**—Brought into hotchpot
See SETTLEMENT 2. 533
— Mode of valuation - - - 533
See SETTLEMENT 2.
- LOAN BY WIFE**—Substituted security - 160
See ADMINISTRATION 1.
- LOCAL GOVERNMENT** — Metropolitan Borough—Councillor—Disqualification—Rate-compounding Agreement—Poor Rate Assessment and Collection Act, 1869 (32 & 33 Vict. c. 41), s. 3—Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 46, sub-s. 1 (e).
HOLDEN v. SOUTHWARK CORPORATION Astbury J. 550
- LOSS OR DAMAGE DUE TO HOSTILITIES**
See PATENT. 69
- MANSION HOUSE**—Lessee of - - - 475
See WILL 9.
- MARRIED WOMAN** - - - 160, 311
See ADMINISTRATION; HUSBAND AND WIFE.
- MEMORANDUM OF ASSOCIATION** — Objects and powers of - 286, 359
See COMPANY 2, 3.
- METROPOLITAN BOROUGH** - - - 550
See LOCAL GOVERNMENT.
- METROPOLITAN WATER BOARD** - 299
See LAND.

- MISFEASANCE**—Directors - - - 543
See COMPANY 1.
- MORTGAGE** - - - 98, 172
See REVENUE; VENDOR AND PURCHASER.
- MOVABLES** - - - 343
See DONATIO MORTIS CAUSA 1.
- MUNICIPAL CORPORATION** - - 440
See CORPORATION 1.
- MUSICAL PLAY** - - - 503
See COPYRIGHT 2.
- NEGLIGENCE** - - - 98
See VENDOR AND PURCHASER 3.
- NEXT OF KIN**—Wife's - - - 230
See SETTLEMENT.
- NOTICE** - - - 631
See COPYRIGHT 1.
- NOTICE TO QUIT**—Purchaser's - 559
See LANDLORD AND TENANT 2.
- NOVELS**—Agreement to publish - 631
See COPYRIGHT 1.
- OBLIGATIONS**—Implied - - - 200
See LEASE.
- ONUS OF PROOF** - - - 404
See EMERGENCY LEGISLATION 3.
- OPTION TO ACQUIRE INTEREST IN COPYRIGHT** - - - 631
See COPYRIGHT 1.
- ORDER OF SPECIAL JUDGE**—Whether appealable - - - 69
See PATENT.
- ORIGINATING SUMMONS** - - - 69
See PATENT.
- PATENT**—Practice—Loss or Damage due to Hostilities — Prolongation of Term—Originating Summons — Time for making Application — Order of special Judge directing Summons to stand over with Liberty to apply — “Decision” — Order, whether subject to Appeal—Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 18; s. 92, sub-s. 2 — Patents and Designs Act, 1919 (9 & 10 Geo. 5, c. 80), s. 7, sub-s. 3; s. 20, Sch.
In re DAVIDSON'S PATENTS. In re GASKIN'S PATENTS - - - C. A. 69
- PERPETUITY** - - - 187, 306
See WILL 4, 5.
- PHARMACY ACT, 1852** - - - 392
See CORPORATION 2.
- POOR RATES**—Agreement to compound 550
See LOCAL GOVERNMENT.
- POWER APPENDANT**—Infants' - 257
See WILL 3.
- POWER OF APPOINTMENT** — General Power — Exercisable by Deed with Consent of Trustees — Donee Person of unsound Mind—Exercise by Deed with Consent of Trustees in Favour of such Persons as Donee should by Will or Codicil appoint—Appointment by Donee's Codicil — Construction — Valid Exercise.
In re DILKE. VEREY v. DILKE - C. A. 34
- POWER OF EXCHANGE** - - - 585
See SETTLEMENT 4.
- POWER OF MEMBER** - - - 392
See CORPORATION 2.
- To acquire surrender of leaseholds 585
See SETTLEMENT 4.
- To jointure and portion - - 475
See WILL 9.
- POWER OF TRUSTEES**—To revoke and resettle - - - 257
See WILL 8.
- PRACTICE**—Prolongation of term - 69
See PATENT.
- Recovery of enemy debt - 269, 284
See ALIEN ENEMY 1, 2.
- PRIOR PUBLICATION** - - - 664
See DESIGN.
- PROOF**—Married woman's right to - 160
See ADMINISTRATION 1.
- PROPOSED INDUSTRIAL COUNCIL**—Ultra vires - - - 392
See CORPORATION 2.
- PROVISION IN EVENT OF FUTURE SEPARATION** - - - 311
- PUBLIC AUTHORITY** - - - 299
See LAND.
- PUBLIC POLICY** - - - 149, 311, 522
See FOREIGN JUDGMENT 3; HUSBAND AND WIFE; WILL 1.
- PUBLIC PURPOSES**—Acquisition of land for - - - 299
See LAND.
- PURCHASER FOR VALUE WITHOUT NOTICE** - - - 98
See VENDOR AND PURCHASER 3.
- QUIET ENJOYMENT**—Covenant for - 200
See LEASE.
- RATE-COMPOUNDING AGREEMENT** 550
See LOCAL GOVERNMENT.
- REASONABLENESS**—Lessor's refusal to assignment - - - 575
See LANDLORD AND TENANT 3.
- Restrictive covenant - - - 642
See RESTRAINT OF TRADE.

- REASONABLY REQUIRED AS A RESIDENCE** - - - - 494
See EMERGENCY LEGISLATION 3.
- RECONCILIATION DEED** - - - - 311
See HUSBAND AND WIFE.
- RECONSTRUCTION OF COMPANY** - 575
See LANDLORD AND TENANT 3.
- RECOVERY OF ENEMY DEBTS** 269, 284
See ALIEN ENEMY 1, 2.
- RECOVERY OF POSSESSION** - - - 494
See EMERGENCY LEGISLATION 3.
- REGISTRATION—Invalidity of** - - 664
See DESIGN.
- REMAINDER TO CHILDREN—Absence of words of limitation** - - - 432
See SETTLEMENT 1.
- RENTCHARGE EXHAUSTING BULK OF ESTATE** - - - - 475
See WILL 9.
- REQUIRED AT TRIAL OF ACTION—Available accommodation** - - - 494
See EMERGENCY LEGISLATION 3.
- RESOLUTION—Validity of** - - - 359
See COMPANY 2.
- RESTRAINT OF TRADE—Auctioneers and Estate Agents—Clerk—Contract of Service—Restrictive Covenant—Uncertainty—Reasonableness—Competition.**
BOWLES v. LOVEGROVE
P. O. Lawrence J. 642
- RESULTING TRUST** - - - - 655
See CHARITY 2.
- REVENUE—Mortgage—Compound Interest with Annual Rests—Capitalisation—"Interest of money"—Income Tax—Income Tax Act, 1918 (8 & 9 Geo. 5, c. 40), Sch. D, Case III., r. 1 (a); General Rules, 19 (1), 21.**
In re MORRIS. MAYHEW v. HALTON
P. O. Lawrence J. 172
- REVERSION IN LOTS—Sale of** - - - 559
See LANDLORD AND TENANT 2.
- REVOCATION OF LIFE ESTATE** - 491
See WILL 6.
- RIGHT OF WAY** - - - - 322
See EASEMENT.
- RIGHT TO VOTE—On shares of bankrupt**
See BANKRUPTCY. 420
- RIGHTS INTER SE—Shareholders'** - 286
See COMPANY 3.
- RISE IN COST OF COAL AND LABOUR**
 455
See EMERGENCY LEGISLATION 2.
- ROYAL CHARTER** - - - - 392
See CORPORATION 2.
- RULE IN SHELLEY'S CASE** - 566
See VENDOR AND PURCHASER 4.
- RULES OF THE SUPREME COURT—Order LV., r. 63** - - - 705
See ADMINISTRATION 2.
- RUSSIAN DOMICIL** - - - - 343
See DONATIO MORTIS CAUSA 1.
- SALE OF REVERSION IN LOTS** - 559
See LANDLORD AND TENANT 2.
- SETTLEMENT—Grant of Freeholds subject to Mortgages—Remainder to Children—Absence of Words of Limitation—Life Estates. In re BOSTOCK'S SETTLEMENT. NORRISH v. BOSTOCK** - - - - Eve J. 432
 2. — Hotchpot—Life interest in entirety—Defeasible reversioner's life interest in a moiety—Liability to hotchpot—Mode of valuation.
In re WEST. DENTON v. WEST
Astbury J. 533
3. — On Second Marriage of Wife—Ultimate Trust—Wife's Next of Kin—"Death without having been married."
In re ELLIS'S SETTLEMENT. WASBROUGH v. BOYCE - - - - C. A. 230
4. — Settled Land—Tenant for Life and Remainderman—Capital or Income—Power of Exchange—Power to acquire Surrender of Leaseholds—Exchange of Freehold Reversions for Short Term Leaseholds—Surrender and Merger of Leaseholds—Capitalisation of Part of increased Income—Settled Land Act, 1882 (45 & 46 Vict. c. 38), ss. 3, 21, 34, 53, 57.
In re DUKE OF WESTMINSTER'S SETTLED ESTATES. DUKE OF WESTMINSTER v. EARL OF SHAFTESBURY - - - Sargent J. 585
- SETTLEMENT OF HEIRLOOMS** - 187
See WILL 4.
- SHAREHOLDERS—Rights of** - - - 286
See COMPANY 3.
- SHARES—Dividends on** - - - 675
See ALIEN ENEMY 3.
- Equitable charge on - - - 420
See BANKRUPTCY.
- Fully paid—Bankrupt's right to vote on - - - 420
See BANKRUPTCY.
- SHELLEY'S CASE—Rule in** - - - 566
See VENDOR AND PURCHASER 4.
- SHIFTING CLAUSE** - - - - 475
See WILL 9.
- SHORTAGE OF SHIPPING** - - - 370
See EMERGENCY LEGISLATION 1.
- SIMULTANEOUS CONVEYANCE BY COMMON OWNER** - - - 322
See EASEMENT.
- SPECIFIC PERFORMANCE** - - - 57
See VENDOR AND PURCHASER 1.

STATUTES :—

1796.
36 Geo. 3, c. 52 (Legacy Duty), s. 13 :
In re WEDGWOOD. ALLEN *v.*
PUBLIC TRUSTEE - - - C. A. 601
1837.
7 Will 4 & 1 Vict. c. 26 (Wills), s. 29 : *In re* THOMAS. THOMAS *v.* THOMAS 306
1846.
9 & 10 Vict. c. 74 (Baths and Wash-
houses) : ATT.-GEN. *v.* FULHAM
CORPORATION - - - 440
1847.
10 & 11 Vict. c. 61 (Baths and Wash-
houses) : ATT.-GEN. *v.* FULHAM
CORPORATION - - - 440
1852.
15 & 16 Vict. c. 56 (Pharmacy) : JENKIN
v. PHARMACEUTICAL SOCIETY OF
GREAT BRITAIN - - - 392
1869.
32 & 33 Vict. c. 41 (Poor Rate Assessment
and Collection), s. 3 : HOLDEN *v.*
SOUTHWARK CORPORATION - 550
- 32 & 33 Vict. c. 42 (Irish Church), s. 69 :
In re FRIEND OF THE CLERGY'S
CHARTERS. FRIEND OF THE CLERGY
v. ATT.-GEN. - - - 409
1873.
36 & 37 Vict. c. 66 (Judicature), s. 25,
sub-s. 6 : *In re* STEEL WING CO.,
LD. - - - 349
1875.
38 & 39 Vict. c. 17 (Explosives), ss. 5, 6 :
HARMER *v.* JUMBIL (NIGERIA) TIN
AREAS, LD. - - - C. A. 200
1881.
44 & 45 Vict. c. 41 (Conveyancing), s. 6,
sub-ss. 2, 4 : HANSFORD *v.* JAGO 322
1882.
45 & 46 Vict. c. 38 (Settled Land), ss. 3,
21, 34, 53, 57 ; *In re* DUKE OF
WESTMINSTER'S SETTLED ESTATES 585
- 45 & 46 Vict. c. 75 (Married Women's
Property), s. 3 : *In re* SLADE.
CREWKERNE UNITED BREWERIES *v.*
SLADE - - - 160
1894.
57 & 58 Vict. c. 30 (Finance), s. 5 : *In re*
WEDGWOOD. ALLEN *v.* PUBLIC
TRUSTEE - - - C. A. 601
- 57 & 58 Vict. c. 73 (Local Government),
s. 46, sub-s. 1 (c) : HOLDEN *v.*
SOUTHWARK CORPORATION - 550

STATUTES—continued.

1906.
6 Edw. 7, c. 47 (Trade Disputes), s. 3,
s. 5, sub-s. 3 : WHITE *v.* RILEY
C. A. 1
1907.
7 Edw. 7, c. 29 (Patents and Designs),
s. 18 ; s. 92, sub-s. 2 : *In re*
DAVIDSON'S PATENTS. *In re* GAS-
KIN'S PATENTS - - - C. A. 69
— s. 55 : GUNSTON *v.* WINOX, LD.
165 ; C. A. 664
1908.
8 Edw. 7, c. 69 (Companies), ss. 130, 137 :
In re STEEL WING CO., LD. - 349
— s. 279 : *In re* CLARIDGE'S
PATENT ASPHALTE CO., LD. - 543
1911.
1 & 2 Geo. 5, c. 46 (Copyright), s. 1,
sub-s. 2 ; s. 5, sub-ss. 2, 3 : ER-
SKINE MACDONALD, LD. *v.* EYLES 631
— ss. 1, 5, 8, 16, sub-ss. 3, 35 :
TATE *v.* THOMAS - - - 503
— s. 22 : GUNSTON *v.* WINOX, LD.
165 ; C. A. 664
1914.
4 & 5 Geo. 5, c. 10 (Finance), s. 14 : *In re*
WEDGWOOD. ALLEN *v.* PUBLIC
TRUSTEE - - - C. A. 601
- 4 & 5 Geo. 5, c. 59 (Bankruptcy), s. 36,
sub-s. 2 : *In re* SLADE. CREW-
KERNE UNITED BREWERIES *v.* SLADE 160
— s. 54 : WISE *v.* LANSDELL 420
- 4 & 5 Geo. 5, c. 87 (Trading with the
Enemy), s. 1, sub-ss. 1, 2 : *In re*
ARAMAYO FRANCKE MINES, LD. C. A. 675
- 4 & 5 Geo. 5, c. 91 (Welsh Church), s. 2,
sub-s. 4 : *In re* FRIEND OF THE
CLERGY'S CHARTERS. FRIEND OF
THE CLERGY *v.* ATT.-GEN. - 409
- 5 Geo. 5, c. 12 (Trading with the Enemy),
s. 2, sub-ss. 1, 2 : *In re* ARAMAYO
FRANCKE MINES, LD. - C. A. 675
— s. 5, sub-ss. 1, 2 : *In re* ANGLO-
AUSTRIAN BANK (LONDON AGENCY) 284
In re NATIONAL BANK FÜR DEUTSCH-
LAND - - - 284
— s. 5, sub-s. 2 : *In re* NIERHAUS 269
1915.
5 & 6 Geo. 5, c. 79 (Trading with the
Enemy), s. 1, sub-ss. 1, 3 : *In re*
ARAMAYO FRANCKE MINES, LD. C. A. 675
1916.
5 & 6 Geo. 5, c. 105 (Trading with the
Enemy), s. 4 : *In re* ARAMAYO
FRANCKE MINES, LD. - C. A. 675

STATUTES—continued.

1917.

7 & 8 Geo. 5, c. 25 (Courts (Emergency Powers)), s. 1, sub-s. 1: NORTH METROPOLITAN ELECTRIC POWER SUPPLY Co. v. STOKE NEWINGTON CORPORATION - - - 455

— s. 2: DIRECT UNITED STATES CABLE Co. v. WESTERN UNION TELEGRAPH Co. - - - 370

1918.

8 & 9 Geo. 5, c. 40 (Income Tax), Sch. D, Case III, r. 1 (a); General Rules 19 (1.), 21: *In re MORRIS. MAYHEW v. HALTON* - - - 172

In re MICHELHAM. MICHELHAM v. MICHELHAM - - - 705

1919.

9 & 10 Geo. 5, c. 33 (Treaty of Peace), s. 1: *In re NIERHAUS* - - - 269

9 & 10 Geo. 5, c. 57 (Acquisition of Land), s. 1, sub-s. 1; s. 12, sub-s. 2: METROPOLITAN WATER BOARD v. BERTON - - - 299

9 & 10 Geo. 5, c. 64 (Courts (Emergency Powers)), s. 1, sub-s. 1 (a): NORTH METROPOLITAN ELECTRIC POWER SUPPLY Co. v. STOKE NEWINGTON CORPORATION - - - 455

— s. 1, sub-s. 1 (a) (b): DIRECT UNITED STATES CABLE Co. v. WESTERN UNION TELEGRAPH Co. - 370

9 & 10 Geo. 5, c. 65 (Welsh Church), s. 7, sub-s. 2: *In re FRIEND OF THE CLERGY'S CHARTERS. FRIEND OF THE CLERGY v. ATT.-GEN.* - 409

9 & 10 Geo. 5, c. 80 (Patents and Designs), s. 7, sub-s. 3; s. 20, Sch.: *In re DAVIDSON'S PATENTS. In re GASKIN'S PATENTS* - - C. A. 9

1920.

10 & 11 Geo. 5, c. 17 (Increase of Rent and Mortgage Interest Restriction), s. 5, sub-s. 1 (b) (d): *NEVILLE v. HARDY* 404

"SUBJECT TO FORMAL CONTRACT" 57
See VENDOR AND PURCHASER.

"SUBJECT TO TITLE AND CONTRACT" 291
See VENDOR AND PURCHASER.

SURPLUS ASSETS - - - 286 655
See CHARITY; COMPANY.

SURRENDER OF LEASEHOLDS - 585
See SETTLEMENT 4.

"TAKE LEGAL PROCEEDINGS" - 311
See HUSBAND AND WIFE.

TENANCY—Contract of - - 370, 559
See EMERGENCY LEGISLATION 1 and LANDLORD AND TENANT 2.

TENANT FOR LIFE AND REMAINDER
See SETTLEMENT 4. 585

TENANT IN TAIL - - - 187
See WILL 4.

TEXT-BOOK—Stiebel's Company Law, 2nd ed., vol. ii, p. 912 - - 349
The suggestion that the omission from s. 130 of the Companies (Consolidation) Act, 1908, of the words "at law and in equity," which occurred in the corresponding s. 80 of the Companies Act, 1862, has changed the law by limiting the meaning of the word "creditor" in s. 137 of the Act of 1908 to creditor at law, not adopted.
See COMPANY 4.

TITLE - - - 566
See VENDOR AND PURCHASER 4.

TRADE UNION—*Trade Dispute—Workmen and Workmen—Conspiracy—Compelling Workman to join Shop Union—Threat to strike on Refusal—Coercion on Employers—Dismissal without Notice—Breach of Contract—Trade Disputes Act, 1906 (6 Edw. 7, c. 47), s. 3; s. 5, sub-s. 3.*
WHITE v. RILEY - - - C. A. 1

TRADING WITH THE ENEMY ACTS
107, 269, 284, 675
See ALIEN ENEMY 1, 2, 3; WAR.

TREATY OF PEACE ACT, 1919 - 269
See ALIEN ENEMY 1.

TREATY OF PEACE ORDER, 1919 - 296
See ALIEN ENEMY 1.

TREATY OF PEACE WITH GERMANY
149, 269, 284
See ALIEN ENEMY 1, 2, and WILL 3.

TRUSTEES—Power to revoke and resettle trusts - - - 257
See WILL 8.

ULTIMATE TRUST - - - 230, 257
See SETTLEMENT 3; WILL 8.

ULTRA VIRES - - - 543
See COMPANY 1.

UNCERTAINTY—Restrictive covenant 642
See RESTRAINT OF TRADE.

VALUATION OF LIFE INTERESTS—Mode of - - - 532
See SETTLEMENT 2.

VENDOR AND PURCHASER—*Contract on Correspondence—Construction—Conditional Offer—"Subject to a formal contract"—Acceptance—Specific Performance.*
ROSSDALE v. DENNY - - - C. A. 57
2. — *Conditional Offer—"Subject to title and contract"—Agreed Terms embodied in Draft Contract—Approval by Vendor—Absence of formal written Agreement inter partes—No enforceable Contract.*
COOPE v. RIDOUT - - - C. A. 291

VENDOR AND PURCHASER—continued.

3. — *Title — Registration—Mortgage—Priority — Legal Estate — Prior equitable Charge — Purchaser for Value without Notice — Absence of Inquiry—Omission to require Production of Deeds—Negligence.*

HUDSTON v. VINEY - - - Eve J. 98

4. — *Title — Will—Devise—"Heir-at-law"—"Absolutely"—Word of Limitation or Purchase—Rule in Shelley's Case.*

In re HUSSEY & GREEN'S CONTRACT
P. O. Lawrence J. 566

VESTING AT BIRTH - - - 187
See WILL 4.

VESTING ORDER - - - 675
See ALIEN ENEMY 3.

VICTORY BONDS - - - 513
See DONATIO MORTIS CAUSA 2.

VOLUNTARY LIQUIDATION—Company 575
See LANDLORD AND TENANT 3.

WAR—Enemy Property — Confiscation — Belligerent Sovereign at War with England — Movable Property in England—Choses in Action — Absence of Distinction between Legal and Equitable Interests — Crown's Right of Forfeiture — Abandonment or cesser of Right by Desuetude — Statutory Super-session—Effect of Trading with the Enemy Acts, 1914–16.

In re FERDINAND, EX-TSAR OF BULGARIA
C. A. 107

— *Emergency legislation* - 269, 284, 675
See ALIEN ENEMY 1, 2, 3.

WAR LEGISLATION—German beneficiaries
See WILL 3. 149

WELSH CHURCH—Disestablishment of 409
See CHARITY 3.

WELSH SOLDIERS—Hospital for - 655
See CHARITY 2.

WILL—Construction — Bequest of Farming Stock for Life—Keeping up at equal Value.

In a bequest for life of farming stock there is an obligation of, but limited to, keeping it up for the benefit of the remainderman.

In re POWELL. DODD v. WILLIAMS
Russell J. 178

2. — *Charity — General charitable Intention—Gift to Charity to be selected by W. within specified Period—Death of W. before Testatrix — Discretion and its Exercise, whether of Essence of Gift.*

In re WILLIS. SHAW v. WILLIS C. A. 44

3. — *Construction — War Legislation—Gift of Life Interest to German National—"If precluded from taking," Over—Treaty of Peace with Germany—Charge — Public Policy.*

In re SCHIFF. HENDERSON v. SCHIFF
Russell J. 149

WILL—continued.

4. — *Heirlooms—To go and be held with Mansion House—"So far as the rules of the law and equity will permit"—"To be held and enjoyed accordingly"—Shifting Clause in Settlement of Mansion House—Tenant in Tail—Vesting at Birth—Rule against Perpetuities.*

In re HARCOURT. VISCOUNT PORTMAN v. PORTMAN - - - Eve J. 187

5. — *Construction — Devise — Gift over — Death without issue attaining twenty-one — Perpetuity — Validity—Wills Act, 1837 (1 Vict. c. 26), s. 29.*

In re THOMAS. THOMAS v. THOMAS
Russell J. 306

6. — *Real Estate—Equitable Limitations—Strict Settlement — Revocation of First Life Estate—First Estate Tail not in esse—Interim Acceleration of Second Life Estate.*

In re CONYNHAM. CONYNHAM v. CONYNHAM - - - C. A. 491

7. — *Legacy Duty — Estate Duty — Incidence — Settled Legacy—"Free of all death duties"—New Duty imposed after Death of Testatrix—Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 13—Finance Act, 1894 (57 & 58 Vict. c. 30), s. 5—Finance Act, 1914 (4 & 5 Geo. 5, c. 10), s. 14.*

In re WEDGWOOD. ALLEN v. PUBLIC TRUSTEE - - - C. A. 601

8. — *Settled Legacy—Power for Trustees with Consent of Legatee to revoke Trusts and resettle—Legatee an Infant—Power Appendant—Validity of Infant's Consent—Ultimate Trust.*

In re SUTTON. BOSCAWEN v. WINDHAM
P. O. Lawrence J. 257

9. — *Shifting Clause — Construction—"Actually entitled to the possession or the receipt of the rents of" the Family Estate "or the bulk of that estate"—Event—Rentcharge exhausting Bulk of Rents—Lessee of Mansion House—Power to Jointure and Portion — Absolute Power of Appointment.*

In re HINCKES. DASHWOOD v. HINCKES
C. A. 475

— *Rule in Shelley's Case* - - - 566
See VENDOR AND PURCHASER 4.

— *Word of limitation or purchase* - 566
See VENDOR AND PURCHASER 4.

WINDING UP OF ENEMY BUSINESS 284
See ALIEN ENEMY 2.

WINDING-UP PETITION—Right to present
See COMPANY 4. 349

WORDS—"Absolutely": In re HUSSEY AND GREEN'S CONTRACT - - - 566

— *"Actually entitled to the possession or receipt of the rents of" the family estate "or the bulk of that estate": In re HINCKES. DASHWOOD v. HINCKES* - - - C. A. 475

WORDS—continued.

- "Alteration of trade conditions occasioned by the war": NORTH METROPOLITAN ELECTRIC SUPPLY CO. v. STOKE NEWINGTON CORPORATION - - - 455
- "Appurtenances": HANSFORD v. JAGO 322
- "At law or in equity": *In re* STEEL WING CO., LD. - - 349
- "Clergymen of the established church of England, etc.": *In re* FRIEND OF THE CLERGY'S CHARTER. FRIEND OF THE CLERGY v. ATT.-GEN. - 409
- "Creditor": *In re* STEEL WING CO., LD. - - - 349
- "Death without having been married": *In re* ELLIS'S SETTLEMENT. WASHBROUGH v. BOYCE - - C. A. 230
- "Decision"—Order of judge: *In re* DAVIDSON'S PATENT. *In re* GASKIN'S PATENT - - C. A. 69
- "Enforcement of contract": DIRECT UNITED STATES CABLE CO. v. WESTERN UNION TELEGRAPH CO. 370
- "Free of all death duties": *In re* WEDGWOOD. ALLEN v. PUBLIC TRUSTEE - - - C. A. 601
- "Heir-at-law": *In re* HUSSEY AND GREEN'S CONTRACT - - 566
- "If precluded from taking": *In re* SCHIFF. HENDERSON v. SCHIFF 149
- "Incidental or conducive": EVANS v. BRUNNER, MOND & CO. - 359
- "Incur any forfeiture": DIRECT UNITED STATES CABLE CO. v. WESTERN UNION TELEGRAPH CO. 370
- "Interest of money": *In re* MORRIS. MAYHEY v. HALTON - - 172
- "Next three books": ERSKINE MACDONALD, LD. v. EYLES - - 631

WORDS—continued.

- "Not trading for profit": METROPOLITAN WATER BOARD v. BERTON* 299
 - "Now due and to accrue due": *In re* ARAMAYO FRANCKE MINES, LD. C. A. 675
 - "Public authority": METROPOLITAN WATER BOARD v. BERTON - 299
 - "Reasonably required": NEVILLE v. HARDY - - - 404
 - "Serious hardship": DIRECT UNITED STATES CABLE CO. v. WESTERN UNION TELEGRAPH CO. - 370
 - "Shortage of shipping": DIRECT UNITED STATES CABLE CO. v. WESTERN UNION TELEGRAPH CO. 370
 - "So far as the rules of law and equity will permit": *In re* HARCOURT. VISCOUNT PORTMAN v. PORTMAN 187
 - "Subject to a formal contract": ROSSDALE v. DENNY - - C. A. 57
 - "Subject to title and contract": COOPE v. RIDOUT - C. A. 291
 - "Take legal proceedings": *In re* MEYRICK'S SETTLEMENT. MEYRICK v. MEYRICK - - - 311
 - "To be held and enjoyed accordingly": *In re* HARCOURT. VISCOUNT PORTMAN v. PORTMAN - - 187
 - "Void": *In re* MEYRICK'S SETTLEMENT. MEYRICK v. MEYRICK 311
- WORDS OF LIMITATION**—Absence of 432
See SETTLEMENT.
- Or purchase - - - 566
See VENDOR AND PURCHASER 4.
- WORKMEN**—Disputes between - 1
See TRADE UNION.



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PART I.—JANUARY 5.

TABLE OF CASES.

CHANCERY DIVISION.

	PAGE		PAGE
DAVIDSON'S PATENTS, <i>In re.</i> <i>In re</i> GASKIN'S PATENTS. C.A. (LORD STERNDALÉ, M.R., WARRINGTON and YOUNGER L.JJ.)	69	ROSSDALE v. DENNY. C.A. (LORD STERNDALÉ M.R., WARRINGTON and YOUNGER L.JJ.)	57
DILKE, <i>In re.</i> <i>In re</i> DILKE'S SETTLE- MENT TRUSTS. VEREY v. DILKE. C.A. (LORD STERNDALÉ, M.R., WARRINGTON and YOUNGER L.JJ.)	34	SCHIFF, <i>In re.</i> HENDERSON v. SCHIFF. RUSSELL J.	149
FERDINAND, EX-TSAR OF BULGARIA, <i>In re.</i> C.A. (LORD STERNDALÉ, M.R., WARRINGTON and YOUNGER L.JJ.)	107	SLADE, <i>In re.</i> CREWKERNE UNITED BREWERIES v. SLADE. SARGANT J.	160
HUDSTON v. VINEY. EVE J. . . .	98	WHITE v. RILEY. C.A. (LORD STERN- DALÉ M.R., WARRINGTON and YOUNGER L.JJ.)	1
RICHARDS v. DAVIES. P. O. LAWRENCE J.	90	WILLIS, <i>In re.</i> SHAW v. WILLIS. C.A. (LORD STERNDALÉ, M.R., WARRINGTON and YOUNGER L.JJ.)	44

FOR MODE OF CITATION, SEE BEGINNING OF INDEX.

[For Names of Editors and Reporters see Inside.]

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